No. 17-467	
Title:	**Andrew Kisela, Petitioner** **v.** **Amy Hughes**
Docketed:	September 28, 2017
Lower Ct:	United States Court of Appeals for the Ninth Circuit
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Apr 02 2018	Petition for certiorari GRANTED, Judgment REVERSED and case REMANDED Justice Sotomayor, with whom Justice Ginsburg joins, dissenting. Opinion per curiam. (Detached **Opinion**)
May 04 2018	JUDGMENT ISSUED.

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No. ___

In the Supreme Court of the United States

ANDREW KISELA,

Petitioner,

v.

AMY HUGHES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Police Corporal Andrew Kisela responded to a call regarding a woman acting erratically and hacking at a tree with a large knife. At the scene, he encountered Amy Hughes, carrying a large kitchen knife, walking down her driveway toward another woman. She approached the other woman, who tried to move away, but Hughes moved with her, staying within easy striking distance. Hughes ignored commands to drop the knife. Kisela shot and wounded her.

1. Did the Ninth Circuit err in holding that Kisela acted unreasonably, given Kisela's well-founded belief that potentially lethal force was necessary to protect the other woman from an attack that could have serious or deadly consequences?

2. Did the Ninth Circuit err—to the point of warranting summary reversal—in refusing qualified immunity in the absence of any precedent finding a Fourth Amendment violation based on similar facts and, indeed, ignoring a case with remarkably similar facts that found no constitutional violation?

PARTIES TO THE PROCEEDING

The Petitioner is Andrew Kisela, Corporal in the University of Arizona Police Department, Defendant below.

The Respondent is Amy Hughes, Plaintiff below, who filed the underlying action under 42 U.S.C. § 1983.

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PETITION FOR WRIT OF CERTIORARI

The Ninth Circuit has departed from its sister circuits to find an unreasonable seizure under the Fourth Amendment when a police officer, seeking to protect a third party, shoots an erratic, knife-wielding person who remains within striking distance of the third party. While excessive-force cases are necessarily fact-intensive, the decision below is contrary to precedent from this Court and at least four circuits. Those courts have considered cases with similar facts and found that no unreasonable seizure occurred, particularly in the context of officers seeking to protect bystanders. The Ninth Circuit departed from these cases by relying on the post hoc, subjective statement of the person whom police officers sought to protect. But such statements, even if they accurately recount the speaker's feelings at the time, cannot determine the objective reasonableness of officers' actions. On the facts of this case, no other circuit would have found a Fourth Amendment violation.

Worse yet, the Ninth Circuit withheld qualified immunity, on grounds that the constitutional violation was clearly established. As the seven judges who dissented from denial of rehearing en banc explained, this outcome is only possible when considering the case at a level of generality that obscures the unpleasant and complicated facts that officers must evaluate in split-second decision-making. App. 17 (Ikuta, J., dissenting). By minimizing the margin for error inherent in qualified immunity analysis, the panel insists that officers prove an actual threat to public safety. This Court has already rejected the same approach by the Ninth Circuit in *City of San Francisco*

v. Sheehan, 135 S. Ct. 1765 (2015); *see also* App. 26 (Ikuta, J., dissenting). This serial error and the plain inapplicability of the cases on which the panel relied—"the most analogous" of which was decided a year *after* the events at issue—warrant summary reversal.

Qualified immunity exists to "protect[] the public from unwarranted timidity on the part of public officials." *Richardson v. McKnight*, 521 U.S. 399, 408 (1997). In this case, Corporal Kisela was concerned about the safety of an unarmed individual being threatened by another person wielding a knife and ignoring officers' instructions to drop the weapon. If the decision below is allowed to stand, the public will, indeed, want for protection.

This Court should grant the Petition on both questions presented or, alternatively, summarily reverse the Ninth Circuit's refusal to follow precedent governing the determination of "clearly established" law.

OPINIONS BELOW

The Ninth Circuit panel's original opinion appears at 841 F.3d 1081 (9th Cir. 2016). (Appendix B.) The order amending that opinion, the order denying en banc rehearing, and the amended opinion appear at 862 F.3d 775 (9th Cir. 2017). (Appendix A.) The district court's decision is unreported but available at 2013 WL 12188383. (Appendix C.)

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals issued its original opinion on November 28, 2016. It amended its opinion and denied the Petitioner's timely petition for en banc rehearing on June 27, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution and 42 U.S.C. § 1983 are included in Appendix D.

STATEMENT OF THE CASE

I. Facts.

On May 21, 2010, University of Arizona Police Corporal Andrew Kisela and Officer-in-Training Alex Garcia responded to a radio call about a woman who was acting erratically and hacking at a tree with a large knife. ER 280. A witness later described her as having been in the middle of the street "screaming and crying very loud," "holding a long knife that was like a butcher's knife ... maybe a foot long," and looking like "she was about to stab herself with the knife or do something crazy." ER 317.

When the officers arrived at the scene, they contacted one of the reporting parties. ER 280, 301, 312. While they talked, Garcia spotted a woman—later identified as Sharon Chadwick—standing in the front yard of a nearby house. ER 280. Chadwick was standing near a parked car in the driveway, inside a

five-foot-tall chain link fence with locked gates. ER 294, 313.

Another woman—later identified as Respondent Amy Hughes—emerged from the house and walked toward Chadwick holding a large kitchen knife in her hand. ER 281, 284-85, 313, 322. Her clothing matched the description of the woman reported to have been chopping at a tree with a knife. ER 280-81.

The ensuing events unfolded in less than a minute. ER 287. As Hughes neared Chadwick, the officers approached the fence and drew their guns. ER 281, 303, 328. They ordered her to drop the knife. ER 109, ¶ 12; 281, 304, 322. They shook the fence in an attempt to get her attention. ER 304, 313. Hughes—fixated on Chadwick—ignored the officers and their commands to drop the knife. ER 209, 281. According to Chadwick, Hughes accused Chadwick of having called the police. ER 109, ¶ 10. Hughes demanded that Chadwick give her $20 that Chadwick owed her; Chadwick told her the money was in the car and when she went to retrieve it, Hughes followed carrying the knife. ER 194, Nos. 3 & 4; 200. Officer Kunz heard Hughes tell Chadwick: "Just give it to me." ER 322. (Although it appeared to Corporal Kisela that the women were talking, he did not hear Hughes say anything. ER 283. 285.)

Chadwick gave Hughes the money and moved to her car, "tryin' to keep some distance between us." ER. 207-08. But Hughes followed her, staying close with the knife in her hand, keeping within striking distance. ER 200, 209, 281, 290, 313, 328. Chadwick stated that Hughes somehow got in front of her with the knife, that she "wasn't putting the knife down," and "she was very

close to me." ER 210. Garcia described Hughes as being within an arm's reach, with her gaze locked on Chadwick in a "thousand mile stare," ER 306, and that Hughes towered over the smaller Chadwick, ER 314. Hughes was within five feet or less of Chadwick—close enough to quickly strike her with the knife—and ignored the officers' commands to drop the knife. ER 200, 209, 281, 297, 306, 313, 328.

Kisela stated that he saw Hughes raise the knife. ER 282. He feared for Chadwick's life. ER 288, 290, 296. He said that based on his training, Hughes's proximity to Chadwick put the latter within the "kill zone," where Hughes could have stabbed Chadwick before the officers could act to prevent it. ER 281, 290. Police-procedures expert Bennie Click stated that an attacker with a knife can stab a victim within half a second even at a distance of ten feet. ER 235. Although Kisela carried a Taser, he did not switch from his gun to the Taser because the events unfolded too quickly, he believed that Hughes was too close to Chadwick, and the fence would have interfered. ER 287, 298.

The fence's top bar obstructed Kisela's aim. ER 285. He therefore dropped down to get Hughes's body in his sights and fired four quick shots, striking her. ER 286, 296, 281. Hughes was so close to Chadwick that she fell right at Chadwick's feet. ER 200, 297. After jumping the fence and handcuffing Hughes, the officers called for medical assistance for Hughes, who sustained no life-threatening injuries. App. 73.

Chadwick was aware of the officers with their drawn guns. ER 209. But she did not express the view that she later asserted: that she did not feel threatened

by Hughes. See, e.g., ER 109, ¶ 12. Hughes was also aware of the police and admitted that she "did not respond to the officers' numerous commands to drop the knife." ER 194, No. 9; 195, No. 16.

II. Proceedings.

A. Trial Court.

Hughes sued in Arizona court, raising a state-law claim and a § 1983 claim for violation of her Fourth Amendment rights. ER 359. Kisela removed to federal court. Dkt. 1. After dismissing the state claim, the district court granted Kisela's Renewed Motion for Summary Judgment on the § 1983 claim. ER 4.

The district court noted that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." App. 82 (emphasis removed) (quoting *Graham v. Conner*, 490 U.S. 386, 396 (1989)). "'[C]onsideration of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'" App. 82 (quoting *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001)). It concluded that "[u]nder the analysis of *Graham*, ... it does not appear that the force used by Defendant was objectively unreasonable in light of all the relevant circumstances." App. 84 (internal quotation marks and citation omitted).

The court did not rule on Kisela's qualified-immunity defense, but opined that, because it had

found his actions reasonable, Kisela "would therefore be entitled to qualified immunity." App. 85.

B. Court of Appeals.

1. Original Opinion.

a. Excessive force.

The Ninth Circuit panel reversed. App. 57. It held that fact issues precluded summary judgment on the excessive-force claim. It concluded that "the record does not support Corporal Kisela's perception of an immediate threat." App. 58. The panel nevertheless acknowledged that "Corporal Kisela was undoubtedly concerned for Ms. Chadwick's safety" and recognized that "in some situations, if the person is armed ... a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." *Id.* (brackets and internal quotation marks omitted). But, it stated, "'a simple statement by an officer that he fears for ... the safety of others is not enough; there must be objective factors to justify such a concern.'" *Id.* (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001)).

The panel also relied on "the severity of the crime being committed," App. 59, and the fact that was Kisela was not a "'lone police officer,'" *id.* (quoting *Deorle*, 272 F.3d at 1281). The panel concluded that a jury, viewing the facts in Hughes's favor, could conclude that "the governmental interest in using force was 'clearly not substantial'" because "'the crime being committed, if any, was minor and the danger to ... others appear [sic] to have been minimal.'" *Id.* (alteration in original) (quoting *Deorle*, 272 F.3d at 1282).

The panel noted that there was evidence suggesting that the police might have suspected that Hughes was mentally ill. *Id.* It acknowledged the Ninth Circuit's "'refus[al] to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.'" *Id.* (quoting *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010)). It nevertheless found that "'[a] reasonable jury could conclude, based upon the information available to Corporal Kisela at the time, that there were sufficient indications of mental illness to diminish the governmental interest in using deadly force." App. 61.

b. Qualified immunity.

Having found a constitutional violation, the panel went on to reject qualified immunity. It acknowledged this Court's admonition that "existing precedent must have placed the ... constitutional question beyond debate." App. 64 (ellipsis in original) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 740 (2011)). Despite this instruction, the panel reasoned that, in the Ninth Circuit, "qualified immunity may be denied in novel circumstances." *Id.* (citing *Mattos v. Agarano*, 661 F.3d 443, 442 (9th Cir. 2011) (en banc)). "'Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct.'" App. 64-65 (quoting *Deorle*, 272 F.3d at 1286). The panel made no effort to reconcile this novel-circumstances doctrine with *al-Kidd*'s beyond-debate rule.

In concluding that any constitutional violation was unworthy of qualified immunity, the panel relied on two Ninth Circuit cases *Deorle* and *Glenn v.*

Washington County, 673 F.3d 864 (9th Cir. 2011), and distinguished a third, *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005).

The panel found the present case analogous to *Glenn*, which was decided after the events at issue. It found *Glenn* "similar ... in several respects," including uncertainty over whether Hughes "was actually threatening anyone," the absence of a "serious crime," and the possibility that Hughes's "failure to drop the knife may have been the result of confusion by an impaired person." App. 46. Similarly, *Deorle* involved a person affected by "some sort of mental impairment," who was not trying to escape when police officers shot him with a bean bag and blinded him. App. 47.

Finally, the panel concluded that *Blanford*, was so easily distinguishable that any reasonable officer would know that shooting Hughes was unconstitutional. In *Blanford*, the plaintiff was carrying a Civil War-era cavalry saber; he made "a loud growling or roaring sound" when he came upon police officers with guns drawn. App. 48 (citation omitted). When he tried to enter a house, the police shot him three times, severing his spine and rendering him a paraplegic. *Id.* The *Blanford* court held both that there was no Fourth Amendment violation in those circumstances, 406 F.3d at 1117-19, and that the deputies were entitled to qualified immunity, *id.* at 1119. The panel here distinguished *Blanford* because Hughes held a kitchen knife rather than a sword. App. 49. In the panel's eyes, the knife is less threatening because it "has a perfectly benign primary use" and because Hughes was only "carving a tree" with it. *Id.* Moreover, the panel found open factual questions surrounding Hughes's

comprehension of the officers' instruction that she drop the knife. *Id.*

2. Amended Opinion and Denial of Rehearing.

Kisela petitioned for rehearing en banc. 9th. Cir. Dkt. 45. The Ninth Circuit denied rehearing, App. 4-5, and the panel simultaneously amended the Opinion, App. 3-4. The amended opinion includes a footnote acknowledging that *Glenn* postdated the events in this case. App. 46 n.2. The panel nevertheless "read *Glenn* as at least suggestive of the state of the clearly established law at the time it was decided" and stated that it relied on "*Glenn* as illustrative, not as indicative of the clearly established law in 2010." *Id*

Judge Ikuta, joined by Judges Kozinski, Tallman, Bybee, Callahan, Bea, and N. R. Smith, dissented from the denial of rehearing en banc. App. 17.

Judge Ikuta faulted the panel for focusing "solely on whether Officer Kisela was unreasonable in determining that Hughes posed a threat," which is "relevant only to the first prong of the qualified immunity inquiry: whether the facts establish a violation of a constitutional right." App. 23 n.1. On the second prong, the panel failed in the task prescribed by this Court by defining the conduct at issue at "a high level of generality." App. 30. The dissenting judges would have reheard the case in order "to define the alleged constitutional violation in terms of the officer's '*particular* conduct.'" *Id.* (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). Viewed through this lens, the panel should have asked whether an officer in Kisela's position could have reasonably thought it

constitutional to "shoot[] a reportedly erratic, knife-wielding woman who comes within striking distance of a third party, ignores multiple orders to drop her weapon, and cannot otherwise be timely subdued due to a physical barrier separating her from the officer." App. 23.

The effects of the panel's over-generalization were evident in its analogies to prior Ninth Circuit cases. Judge Ikuta noted the panel's "fail[ure] to identify a case where an officer acting under similar circumstances as Officer [Kisela] was held to have violated the Fourth Amendment." App. 24. She attacked the panel's reliance on *Glenn*:

> [H]aving now conceded that the panel's "most analogous Ninth Circuit case," is merely "suggestive of the state of the clearly established law," and serves only "as illustrative" rather than "as determinative of clearly established law," the panel opinion more clearly than ever rests on nothing but the general rule that deadly force requires an objective threat of harm.

App. 25 n.2 (citations omitted).

Judge Ikuta also compared the panel's reasoning to the Ninth Circuit decision that this Court overruled in *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015)). "As in *Sheehan*," Judge Ikuta explained, the panel had denied qualified immunity based on the view that the Fourth Amendment "requires an objective threat," while failing to cite any precedent that would establish the lack of such a threat under analogous circumstances. App. 26-27.

The panel responded in an opinion by Judge Berzon concurring in the denial of en banc rehearing. App. 5-17. Judge Ikuta, in turn, replied to Judge Berzon's points. App. 32-34.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to clarify Fourth Amendment standards governing an officer's reasonable apprehension of the danger of death or serious injury that justify the use of deadly force. Additionally or alternatively, it should grant certiorari and summarily reverse the Ninth Circuit to ensure the proper application of qualified immunity.

I. The Ninth Circuit's Finding of a Constitutional Violation Fails to Consider Potential Third-Party Harm, in Contravention of Precedent from this Court and Four Circuits.

The panel decision fails to consider adequately the reasonableness, as "judged from the perspective of a reasonable officer on the scene," *Graham*, 490 U.S. at 396, of using potentially deadly force to protect innocent lives from a significant threat of attack. That determination conflicts with this Court's precedent and precedent from the Fifth, Sixth, Tenth, and Eleventh Circuits.

This Court requires the plaintiff in an excessive-force case to show that the force used against him was objectively unreasonable. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015). Officers often face life-and-death situations requiring them to determine whether an armed assailant "poses a significant threat of death or serious physical injury to ... others." *Tennessee v.*

Garner, 471 U.S. 1, 3 (1985). Using deadly force is appropriate "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Id.* at 11. This determination is objective and is made "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Courts must "allow[ ] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 397; *accord Ryburn v. Huff*, 565 U.S. 469, 477 (2012). Reasonableness is judged on the "facts and circumstances of each particular case." *Graham*, 490 U.S. at 396. One paramount circumstance, however, is concern for third parties, *id.*, which the panel below discounted with the benefit of hindsight and facts unknown to Corporal Kisela.

The error here is best illustrated by comparing the panel's holding to a prior Ninth Circuit holding on strikingly similar facts. In the earlier decision, deputies received reports that a man was walking through a residential neighborhood brandishing a sword. *Blanford*, 406 F.3d at 1112. They found Blanford carrying an old cavalry saber; he ignored their orders to drop it. *Id.* They followed him with guns drawn until he turned toward them and raised the sword once, making a "loud growling or roaring sound." *Id.* at 1113. They considered whether he was mentally disturbed or on drugs but "believed they 'had to secure the weapon before doing anything else in order to protect the public.'" *Id.*

Blanford then approached a house and tried to enter through the front door. *Id.* When he could not open it, he walked toward the side of the house, past the garage, and headed for a gate leading to the backyard. *Id.* "[D]ue to the danger he presented to anyone in the yard or the house," both deputies fired, striking him. *Id.* He nevertheless continued through the gate, which closed behind him. *Id.* A deputy opened the gate and saw Blanford "trying to open a door into the garage," which led to the house. *Id.* The deputy again ordered Blanford to drop the sword but he did not comply and continued trying to open the door; the deputy shot him again from about ten feet away. *Id.* "He did so out of concern that Blanford would be able to get into the residence and cause death or injury to people inside." *Id.* Blanford then walked toward the backyard; the deputy then shot him again, this time severely injuring him. *Id.* at 1113-14. "The entire encounter lasted about two minutes. Approximately fourteen seconds passed between the first and last shots." *Id.* at 1114. After the fact, the deputies learned that Blanford lived in the house and that no one was in the home at the time. *Id.* at 1113, 1116.

The Ninth Circuit held that there was no Fourth Amendment violation because the deputies had acted reasonably. They "had cause to believe that Blanford posed a serious danger to themselves and to anyone in the house or yard ... because he failed to heed warnings or commands and was armed with an edged weapon that he refused to put down." *Id.* at 1116. The officers considered the possibility that Blanford was "mentally disturbed" but used potentially deadly force to incapacitate him because he "was armed with a dangerous weapon and it was not objectively

unreasonable for them to consider that securing the sword was a priority." *Id.* at 1117.[1]

In short, the use of force was not excessive, because the officers faced a situation that was *potentially* dangerous for any innocent persons who *might* be nearby—in the backyard or inside the house. The deputies had not actually seen anyone who might be in danger, however. Other courts, including this Court, have recognized that no Fourth Amendment violation occurs when an officer uses deadly force to prevent potential harm to third parties.

In *Scott v. Harris*, 550 U.S. 372, 385 (2007), this Court rejected an argument that police should have ceased a pursuit instead of ramming the suspect's car, explaining that "the police need not have taken th[e] chance" that the pursuit would have ended without harming bystanders. The officer's use of potentially lethal force was objectively reasonable because of "an actual and imminent threat to the lives of any pedestrians *who might have been present*, to other civilian motorists, and to the officers involved." *Id.* at 384 (emphasis added); *accord Brosseau v Haugen*, 543 U.S. 194, 197 (2004) (granting qualified immunity to officer for shooting a driver to protect "any other citizens who *might* be in the area") (emphasis added); *Mullenix*, 136 S. Ct. at 309-10 (citing *Brosseau* for same principle in granting qualified immunity to officer for shooting at suspect's car).

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[1] In contrast to the *Blanford* panel, the panel here concluded that whether or not Kisela should have been aware of Hughes's mental state created a jury question concerning the reasonableness of using deadly force. App. 41.

In *Larsen's Estate v. Murr*, 511 F.3d 1255, 1260-61 (10th Cir. 2008), the Tenth Circuit ruled that an officer justifiably shot a man holding a knife, even though he had made no stabbing or lunging motions at the officer, who was twenty feet away and had means to retreat. "A reasonable officer need not await the 'glint of steel' before taking self-protective action; by then, it is 'often ... too late to take safety precautions.'" *Id.* at 1260 (quoting *People v. Morales*, 198 A.D.2d 129, 130 (N.Y. App. Div. 1993)).

The same court reached a similar conclusion in *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304 (10th Cir. 2009). It found that an officer acted reasonably in shooting an armed suspect who had been moving a gun up and down and had previously aimed it at officers, even though the suspect was pointing the gun toward his own head when the officer fired the fatal shot. *Id.* at 1318 ("[I]t was reasonable for the officers to believe that Mr. Thomson was an immediate threat to them or to others in the neighborhood.").

The Eleventh Circuit agreed in *Long v. Slaton*, 508 F.3d 576 (11th Cir. 2007), where a deputy fatally shot Long, a mentally disturbed individual who had taken the deputy's cruiser and was starting to drive away. *Id.* at 580. It noted that "'an officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force.'" *Id.* at 581 (quoting *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997)). Although the incident occurred in a remote, rural area, *id.* at 578 n.1, and the suspect "had not yet used the police cruiser as a deadly weapon," the deputy still had "reason to believe that Long was dangerous." *Id.* at 581. The court noted that if the

deputy had not fired, he "would have provided the man with a potentially (to say the least) lethal weapon." *Id.* at 583.

Likewise, the Fifth Circuit found no excessive force when police fatally shot a seemingly intoxicated man who was armed with a sword. *Mace v. City of Palestine*, 333 F.3d 621 (5th Cir. 2003). The man had "ma[de] punching motions with his sword while no more than ten feet away from the officers ... [and] was raising his sword toward the officers." *Id.* at 624. Applying *Graham*, the court found the lethal force reasonable because the confrontation "took place in the close quarters of a mobile home park, which limited the officers' ability to retreat or to keep [the plaintiff] from *harming others* in the area." *Id.* at 624-25 (emphasis added).

A similar concern motivated officers in the Sixth Circuit to deploy lethal force against a man who was wrestling with his father for control of a butcher knife. *Untalan v. City of Lorain*, 430 F.3d 312, 313-15 (6th Cir. 2005). The officer who shot the man had witnessed him lunge at a fellow officer but was unaware that he had stabbed the officer in the process. *Id.* at 313. The man was schizophrenic, but this mental disease was not sufficient to render the shooting unreasonable: the Sixth Circuit applied *Graham* and concluded that "no reasonable juror could disagree that [the decedent] posed a serious and immediate threat to the safety of others." *Id.* at 315; *see also id.* at 317 ("[T]he *Graham* standard recognizes that danger to anyone in the area is sufficient to justify the use of deadly force."). The man was struggling with his father when the officer shot; the officer believed—perhaps mistakenly—that

the man still had his knife at that time. *Id.* at 314. The court held that the officer did not lose qualified immunity "for reasonably, though perhaps incorrectly in hindsight, perceiving an immediate and serious threat." *Id.* at 315-16.

Had the Ninth Circuit panel accounted for the risk to third parties in the same manner as this Court and the other circuits, this case would have come out differently. In the Fifth, Sixth, Tenth, and Eleventh Circuits—and in this Court—officers who face an uncertain and rapidly evolving situation in which an uncooperative, possibly disturbed person is armed with a deadly weapon, do not violate the Fourth Amendment by making a split-second decision to use lethal force to prevent harm to potential victims. The same rule should apply here.

Kisela observed Hughes walk down her driveway and approach Chadwick while armed with a large, dangerous knife. ER 281, 284-85. She matched the description of a woman who had very recently been hacking at a tree with a large knife. ER 280-81. When Chadwick moved to put distance between the two, Hughes moved with her, staying within striking distance. ER 200, 209, 281, 290, 313, 328. She ignored orders to drop the knife. ER 200, 209, 281, 297, 306, 313, 328. Judge Berzon, joined by the other two judges on the panel, ignores all these relevant facts when she suggests this case is akin to "someone standing outside a house using a kitchen knife to chop onions at a summer barbeque, while chatting amicably with another woman standing close by." App. 2 at 7-8 (Berzon, J., concurring in denial of rehearing en banc).

Not even Hughes asserts such an absurd theory of the events in this case.

Indeed, this case is even stronger than *Scott* and *Brosseau* in terms of the potential for danger to others. Those cases involved a threat to hypothetical third parties who "might have been present." *Scott*, 550 U.S. at 384. If anything, it was more reasonable for Corporal Kisela to protect the very real Sharon Chadwick, who was unarmed, had no means of protecting herself from Hughes, and was in such close proximity to the knife-wielding Hughes that the latter fell at Chadwick's feet. The weighing of these facts related to third-party risk would have led to a different conclusion if it had been undertaken by this Court or one of the circuits that follows this Court's precedent.

Furthermore, the panel abandoned the necessary objective inquiry, preferring instead to cherry-pick statements from other witnesses about their own, subjective perceptions. In concluding that "the record does not support Corporal Kisela's perception of an immediate threat," the panel relied on what Officer Garcia did not see—*i.e.*, he did not see Hughes raise the knife. App. 38. The panel also faulted Corporal Kisela for Chadwick's post hoc statement that Hughes was "non-threatening" while looming over her with a knife. App. 39. These fragments of testimony are immaterial under the required objective test.

The fact that one officer did not see Hughes raise her knife does not diminish the reasonableness of Kisela's perception of an immediate threat. Hughes did not need to raise the knife to present a deadly threat: Given how quickly she could have slashed Chadwick, it was hopelessly naïve to conclude that

Hughes did not present an imminent danger. *Cf. Blanford*, 406 F.3d at 1116 (holding it reasonable to shoot a suspect armed with a sword even though he was not raising it to strike anyone at the time).

The panel's reliance on Chadwick's statement was also inappropriate. Her level of concern is subjective and irrelevant. She knew Hughes well and believed, based on their history, that Hughes would not use the knife on her. ER 109, ¶ 11; 207, 212-13. But Kisela knew none of that. A reasonable officer would certainly perceive that the situation was very dangerous. As this Court has explained, the Fourth Amendment analysis is limited to the facts known to the officer. *Kingsley*, 135 S. Ct. at 2474. The Sixth Circuit has similarly recognized that officers may make lethal-force decisions on partial information that might have come out differently had the officer known every relevant fact. *Hocker v. Pikeville City Police Dep't*, 738 F.3d 150, 155 (6th Cir. 2013) (rejecting excessive-force argument based on facts unknown to officer at the time).

The panel's divergence from the decisions cited above warrants certiorari to settle this area of the law and bring the Ninth Circuit into compliance with the Fourth Amendment standard that controls in the rest of the country.

II. The Panel Manifestly Erred by Denying Qualified Immunity, and Summary Reversal Is Appropriate.

The panel's most glaring error lies in its conclusion that any constitutional violation was so clearly established that qualified immunity does not apply to Corporal Kisela. As demonstrated above, any constitutional violation was far from clearly established, especially in light of the Ninth Circuit's *Blanford* decision. To avoid qualified immunity, the panel committed several errors. It relied on a decision issued *after* the events in this case. It ignored facts that contradicted its conclusion, thereby describing the facts at such a level of abstraction that they appear comparable to earlier cases in which the court had found a Fourth Amendment violation. And it ignored the fact that other judges—including seven on the Ninth Circuit—disagreed with its conclusion.

A. The Panel's Cited Cases Did Not Clearly Establish a Constitutional Violation.

Qualified immunity shields officials from § 1983 suits if "their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix*, 136 S. Ct. at 308 (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). While Hughes has a right to be free from unreasonable seizures, merely incanting a general constitutional guarantee does not suffice. "A clearly established right is one that is 'sufficiently clear that *every reasonable official* would have understood that what he is doing violates that right.'" *Id.* (emphasis added) (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)). While "a case directly on

point" is not necessary, "'existing precedent must have placed the ... constitutional question *beyond debate*.'" *Id.* (emphasis added) (quoting *al-Kidd,* 563 U.S. at 741). Hence, "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)).

This Court has "'repeatedly told courts ... not to define clearly established law at a high level of generality;'" they must instead determine "'whether the violative nature of *particular* conduct is clearly established.'" *Id.* (quoting *al-Kidd,* 563 U.S. at 742). Courts must examine the issue "'in light of the specific context of the case, not as a broad general proposition.'" *Id.* (quoting *Brosseau,* 543 U.S. at 198). This "is especially important in the Fourth Amendment context" because "'[i]t is sometimes difficult for an officer to determine how ... excessive force[ ] will apply to the factual situation the officer confronts.'" *Id.* (alteration in original) (quoting *Saucier v. Katz,* 533 U.S. 194, 205 (2001)). "This exacting standard 'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'" *Sheehan,* 135 S. Ct. at 1774 (alteration in original) (quoting *al-Kidd,* 131 S. Ct. at 2085).

Because this Court has never held an officer liable for excessive force in a case similar to this one, clearly established law would have to be found in a "'robust consensus of cases of persuasive authority.'" *Sheehan,* 135 S. Ct. at 1778 (quoting *al-Kidd,* 131 S. Ct. at 2084).

But, as in *Sheehan*, "no such consensus exists here." *Id.*

The panel relied on three Ninth Circuit cases: *Deorle*, *Glenn*, and *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997). App. 45-49. As the following discussion demonstrates, these cases do not come close to clearly establishing the law here.

1. *Deorle*. Judge Ikuta powerfully demonstrates the "stark" differences between this case and *Deorle*:

> In stark contrast to *Deorle*, Officer Kisela was present at the scene for only a matter of seconds, while the officer in *Deorle* had been on the scene for forty minutes and had observed the victim "for about five to ten minutes from the cover of some trees." Hughes was not only armed (unlike Deorle), but also refused at least two requests to drop her knife (again unlike the largely compliant Deorle). Likewise, Hughes was within striking distance of a third party while separated from the officers by a physical barrier, and Officer Kisela had been put on notice of Hughes's earlier erratic behavior with a knife, which Officer Kisela had been dispatched to investigate. Shooting an armed, unresponsive, and reportedly erratic woman as she approaches a third party is materially different from shooting an unarmed, largely compliant man as he approaches an officer with a clear line of retreat.

App. 25-26 (citation omitted). Hence, "the differences between that case and the case before us leap from the page," *Sheehan*, 135 S. Ct. at 1776. *Deorle* therefore

cannot clearly establish the law here, and it does not contribute to a consensus of persuasive authority.

2. *Glenn*. The panel's reliance on *Glenn*—which it called "the most analogous" case, App. 46—is particularly egregious. After publishing the initial opinion and later realizing that *Glenn* "was decided more than a year after the incident in this case," App. 45 n.2, the panel did not retreat as one might expect, but instead clung to the legally irrelevant decision in *Glenn*. While adding a footnote recognizing the problem, the panel nevertheless considered it "as at least suggestive of the state of the clearly established law at the time it was decided," and "rel[ied] on *Glenn* as illustrative, not as indicative of the clearly established law in 2010." App. 46 n.2. But qualified immunity depends on the clarity of the law as it existed in May 2010, and a 2011 opinion obviously has no application.

3. *Harris*. In deleting a reference to *Glenn* from its suggestion that this was an obvious case, the panel substituted *Harris*. App. 49. Judge Ikuta made shortshrift of that decision, and her statement suffices:

> [T]he suggestion that Officer Kisela ought to have known that his conduct was unlawful because we held in the wake of Ruby Ridge that a sniper ensconced safely on a hill cannot shoot a retreating suspect merely because that suspect had committed a crime *the day before*, does not pass the straight-face test.

App. 30 (citation omitted). Just so.

In this Court's words, "[e]ven a cursory glance at the facts of [the panel's cases] confirms just how different [they are] from this one." *Sheehan*, 135 S. Ct. at 1776.

The panel "failed to identify a case where an officer acting under similar circumstances as [Kisela] was held to have violated the Fourth Amendment." *White v. Pauly*, 137 S. Ct. 548, 552 (2017).

Furthermore, contrary Ninth Circuit authority—*Blanford*—suggests that Kisela's actions were squarely within constitutional bounds. Judge Ikuta demonstrated *Blanford*'s applicability to this case, noting that the four elements supporting its holding are also present here: "Hughes was armed, refused to drop her weapon, was not surrounded, and was attempting to put herself in a situation where she could have caused harm that the officers would not have been able to prevent." App. 28. As a result, it is "clear that Officer Kisela could have reasonably relied on *Blanford* to justify his use of force against Hughes." *Id.*

But the panel found *Blanford* critically different: "Most importantly, in contrast to a clearly disturbed man carrying a sword, Ms. Hughes held a kitchen knife —which has a perfectly benign primary use—down at her side." App. 49. Thus, despite "acting erratically," "approaching a third party," and refusing to "comply with orders to drop the knife," Hughes might nevertheless persuade a jury that "she had a constitutional right to walk down her driveway holding a knife without being shot." App. 49. This bizarre retelling of the facts exposes several flaws in the panel's qualified immunity reasoning that go beyond infelicitous precedent.

First, the panel denies qualified immunity because of putative factual disputes regarding the merits issue, excessive force. The panel described the "same determinations" as bearing on both the merits of

Hughes's excessive-force claim—*i.e.*, that a jury might conclude that Kisela's use of force was unreasonable—and the second prong's qualified-immunity question of whether any such violation was clearly established. App. 48. This was erroneous. The second prong of the qualified-immunity analysis is not for the jury; it "depends on an inquiry distinct from whether an officer has committed a constitutional violation." *Heien v. North Carolina*, 135 S. Ct. 530, 537 (2014). And the *court* decides whether "reasonable police officers in [Kisela's] position *could have come to the conclusion* that the Fourth Amendment permitted" him to act as he did. *Ryburn*, 564 U.S. at 477 (emphasis added); *see also* App. 23 n.1 (Ikuta, J., dissenting) ("[T]his is not the appropriate inquiry at the second prong, where the question is whether precedent placed 'beyond debate' that the officer's 'particular conduct' was unlawful ... .").

Second, by framing the qualified-immunity analysis in terms of the excessive-force analysis, the panel essentially frames the qualified-immunity question as whether Hughes had a clearly established right not to be subjected to an unreasonable use of force. As this Court has previously noted, "[q]ualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures." *Sheehan*, 135 S. Ct. at 1776.

Third, while initially acknowledging facts supporting Kisela's reasonable apprehension of danger, the panel ignores those facts in its analysis. The panel thus asked whether Hughes "had a constitutional right to walk down her driveway holding a knife without being shot." App. 49. Without additional facts, the answer to that question seems obvious, but omitting

the specific facts that concerned Corporal Kisela means not addressing qualified immunity at all. The panel thus disregarded this Court's instruction to consider qualified immunity "in light of the specific context of the case." *Mullenix*, 136 S. Ct. at 308.

This error is exacerbated by the panel's insistence that a kitchen knife "has a perfectly benign primary use." App. 49. Of course kitchen knives have perfectly benign primary uses; so do lead pipes, but if a person wields any number of "benign" objects in circumstances outside of their normal uses, an officer could reasonably conclude that their presence is not benign. The panel looked at the facts of this case through rose-colored glasses, but qualified immunity precedent—to say nothing of self-preservation and concern for third parties—does not require police officers to take such a naïve approach. *Cf. Montoute*, 114 F.3d at 185 (recognizing that although plaintiff was not aiming his shotgun at anyone when officers fired, "there was nothing to prevent him from doing [so] in a split second").

Fourth, the panel also invoked the Ninth Circuit's rule that "qualified immunity may be denied in novel circumstances." App. 45 (citing *Mattos*, 661 F.3d at 442.)[2] "Otherwise," it complained, "officers would escape responsibility for the most egregious forms of

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[2] As Judge Wallace recently noted, it is unlikely that the Ninth Circuit's pronouncement that it "may deny qualified immunity 'in novel circumstances'" survives this Court's intervening decision in *White*, 137 S. Ct. 552. *Lopez's Estate v. Gelhaus*, No. 16-15175, 2017 WL 4183595, at *25 (9th Cir. Sept. 22, 2017) (quoting App. 45).

conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct.'" *Id.* (quoting *Deorle*, 272 F.3d at 1286). That begs the question. Labeling conduct "egregious" presumably means that a reasonable person in the same circumstances would have known that his actions were unconstitutional. The panel's attempt to invoke hypothetical "egregious" actions provides no escape from the logic of this Court's precedent.

In sum, even if the panel's cases supported its holding, *Blanford*'s existence demonstrates that "[f]ar from clarifying the issue, [Ninth Circuit] excessive force cases ... reveal the hazy legal backdrop against which [Kisela] acted." *Mullenix*, 136 S. Ct. at 309. Thus, even if one circuit's cases could clearly establish the law—evidently a dubious proposition, *see Sheehan*, 135 S. Ct. at 1776—Ninth Circuit cases do not present a robust consensus. When precedents conflict, the constitutional question is not beyond debate, and the law is decidedly *not* clearly established. *See, e.g.*, *Carroll v. Carman*, 135 S. Ct. 348, 352 (2014). In such circumstances, courts must recognize and apply qualified immunity.

Accordingly, Kisela is entitled to qualified immunity as a matter of law. The panel's conclusion that the law was clearly established is simply and utterly wrong.

B. The Conflict Among Judges in the Ninth Circuit Demonstrates the Lack of Clearly Established Law.

Qualified immunity applies unless the law "is 'sufficiently clear that every reasonable official would

have understood that what he is doing violates that right.'" *Mullenix*, 135 S. Ct. at 308 (quoting *Reichle*, 132 S. Ct. at 2093). It applies unless existing precedent puts the legal issue "beyond debate." *al-Kidd*, 563 U.S. at 741.

The issue here was not beyond debate: the panel literally engaged in a debate with both the district judge and the dissenters. The law cannot be clearly established for police officers who face dangerous situations in real time if judges—"far removed from the scene and with the opportunity to dissect the elements of the situation," *Ryburn*, 565 U.S. at 475—cannot agree on it. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999); *accord Stanton v. Sims*, 134 S. Ct. 3, 7 (2013) (granting qualified immunity based at least in part on the fact that cases on which the plaintiff relied had not persuaded district judges to conclude that the law was clearly established).

When an appellate panel overrules the district judge or issues a non-unanimous decision, the authoring judges may appropriately be confident that they have correctly decided the constitutional issue. But that confidence cannot translate into a rejection of qualified immunity. If other judges—be they appellate or trial judges—disagree with them, then the law is almost by definition *not* clearly established (unless the opposition have completely overlooked a controlling precept or committed some other egregious error). *See Stanton*, 134 S. Ct. at 7 ("It is especially troubling that the Ninth Circuit would conclude that Stanton was

plainly incompetent—and subject to personal liability for damages—based on actions that were lawful according to courts in the jurisdiction where he acted.").

If judges—who are blessed with briefs, law clerks, staff attorneys, judicial colleagues, years of legal experience, and months of time to contemplate the problem—cannot agree on the law, it is unreasonable to suggest that a police officer should have discerned the "right" answer while on-the-spot and facing a potentially dangerous situation and having less than a minute to decide.

* * *

This Court has recently issued several summary reversals in qualified-immunity cases. *White*, 137 S. Ct. at 551. It "has found this necessary both because qualified immunity is important to society as a whole and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *Id.* (quotation marks & citations omitted). Those factors apply here and compel the same action.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-15059
D.C. No. 4:11-cv-00366-FRZ

[Filed June 27, 2017]

AMY HUGHES,
Plaintiff-Appellant,

v.

ANDREW KISELA, Corporal,0203;
individually and in his official capacity,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, District Judge, Presiding

Argued and Submitted September 12, 2016
San Francisco, California

Filed November 28, 2016
Amended June 27, 2017

Before: Ronald M. Gould and Marsha S. Berzon, Circuit Judges, and William K. Sessions III,* District Judge.

ORDER AND AMENDED OPINION

Order Amending Opinion;
Order Denying Petition for Rehearing En Banc;
Concurrence in Order Denying Petition for Rehearing En Banc;
Dissent to Order Denying Petition for Rehearing En Banc;
Opinion by Judge Sessions

SUMMARY**

Civil Rights

The panel amended the opinion, filed on November 28, 2016, and on behalf of the court denied the petition for rehearing en banc.

In the amended opinion, the panel reversed the district court's summary judgment in favor of a University of Arizona police officer and remanded in a 42 U.S.C. § 1983 action in which plaintiff alleged that the officer used excessive force when he shot her four times.

Judge Berzon, joined by Judge Gould, concurred in the denial of rehearing en banc, and wrote separately

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* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

to address arguments in Judge Ikuta's dissent from the denial of rehearing en banc.

Judge Ikuta, joined by Judges Kozinski, Tallman, Bybee, Callahan, Bea, and N.R. Smith, dissented from the denial of rehearing en banc because the panel opinion took a path contrary to the Supreme Court's direction on the proper application of the qualified immunity doctrine in the Fourth Amendment context.

COUNSEL

Vince Rabago (argued), Stacy Scheff, and Norma Kristine Rabago, Vince Rabago Law Office PLC, Tucson, Arizona, for Plaintiff-Appellant.

Robert R. McCright (argued), Assistant Attorney General; Mark Brnovich, Arizona Attorney General; Office of the Attorney General, Tucson, Arizona; for Defendant-Appellee.

ORDER

The opinion filed November 28, 2016, is amended as follows:

1. At page 14 of the slip opinion, add "(en banc)" after the citation "*Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011)."

2. At page 15 of the slip opinion, add a footnote after "this Court remanded *Glenn* for a jury trial." The footnote in the amended opinion should state:

> *Glenn* was decided on summary judgment after the incident that gave rise to this case. It concerned a shooting that occurred in 2006. The panel in *Glenn* concluded that "resolution of . . .

[genuine factual] issues is crucial to a proper determination of the officers' entitlement to qualified immunity," and remanded the question whether the right was clearly established at the time of the alleged misconduct, to be decided "after the material factual disputes have been decided by the jury." 673 F.3d at 871. Although the panel stated that it was "[expressing] no opinion on the second part of the qualified immunity analysis," the remand for trial would have been improper were the officers entitled to qualified immunity on the facts most favorable to the plaintiff. *See Mattos*, 661 F.3d at 445–48, 452. We therefore read *Glenn* as at least suggestive of the state of the clearly established law at the time it was decided.

In any event, we rely on *Glenn* as illustrative, not as indicative of the clearly established law in 2010. *See* Berzon, J., concurring in the denial of rehearing en banc, at 9–12.

3. At page 17 of the slip opinion, delete the "*Glenn* and *Deorle*" and replace it with "*Deorle* and *Harris*."

No new Petition for Panel Rehearing or Petition for Rehearing en Banc will be entertained.

ORDER

Judges Gould and Berzon voted to deny the petition for rehearing en banc, and Judge Sessions so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to

receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

BERZON, Circuit Judge, with whom GOULD, Circuit Judge, joins, concurring in the denial of rehearing en banc:[***]

I write separately to address the arguments in Judge Ikuta's dissent from the denial of rehearing en banc.

The dissent's principal complaint is that the panel characterized the relevant constitutional right at too high a level of generality. That is incorrect. The dissent proposes that the panel failed adequately to consider the "specific context" of the circumstances facing Corporal Andrew Kisela. That is mistaken. And the dissent suggests that qualified immunity is available in an excessive force case only where there is an identical or nearly identical prior case which held that force was excessive. That understanding is directly contrary to the Supreme Court's repeated recognition that no case is likely to be directly on point factually, so the qualified immunity inquiry must be whether existing precedent places the constitutional question beyond debate.

[***] Judge William K. Sessions III, a visiting judge from the District of Vermont sitting by designation, was a member of the three-judge panel that decided this case and the author of the Panel's opinion. Judge Sessions agrees with the views expressed in this opinion.

1. The Supreme Court has indeed advised lower courts construing claims of qualified immunity in excessive force cases "not to define clearly established law at a high level of generality." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). The import of that instruction is, as the Court has explained, that "doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Id.* The panel's opinion could not reasonably be characterized as avoiding that "crucial question." Nor, in defining the relevant constitutional right at issue, did the panel rely simply on the general, abstract principle set forth in *Tennessee v. Garner*, 471 U.S. 1 (1985), that "deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," as the Supreme Court has cautioned us not to do. *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam) (citation omitted). Nowhere did the panel define the relevant right as the "right to be free of excessive force," as the dissent incorrectly asserts in its opening lines.

Instead, the panel held that our precedents clearly established a far more specific constitutional right: that under the Fourth Amendment, a mentally disturbed individual who had committed no known crime, was not acting erratically when encountered by police, and presented no objective threat to officers or third parties may "walk down her driveway holding a knife without being shot." *Hughes v. Kisela*, 841 F.3d 1081, 1090 (9th Cir. 2016). Taking the facts in the light most favorable to Hughes, that is what happened in this case. On those facts, the panel held, no reasonable police officer

could have thought that shooting Hughes was constitutionally permissible.

The inverse of a "high level of generality" is not, as the dissent suggests, a previous case with facts identical those in the instant case – because, of course, no two cases are exactly alike. The Supreme Court has repeatedly stated that "[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 741); *see also White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam). Were the rule otherwise, as we have previously observed, "officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." *Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 2001). "If qualified immunity provided a shield in all novel factual circumstances, officials would rarely, if ever, be held accountable for their unreasonable violations of the Fourth Amendment." *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011) (en banc). It is thus "clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

Consider, for example, the hypothetical case of a policeman who happens upon someone standing outside a house using a kitchen knife to chop onions at a summer barbecue, while chatting amicably with another woman standing close by. The policeman draws his weapon and, twice in rapid succession, orders the individual holding the knife to drop it; when

she does not immediately comply, the policeman opens fire within a few seconds and shoots the individual four times. There is no precedential case with these precise facts (although this case, when the facts are viewed in the light most favorable to Hughes, is not far off), yet our precedents as well as common sense would place beyond debate the question of whether that officer acted lawfully.

In the absence of a precedential case with precisely the same facts as the case before us, we must compare the specific *factors* before the responding officers with those in other cases to determine whether those cases would have put a reasonable officer on notice that his actions were unlawful.[1] That framework is precisely

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[1] *Mullenix*, on which the dissent places great emphasis, is wholly consistent with the analysis I identify here. *See also City & Cty. of San Francisco. v. Sheehan*, 135 S. Ct. 1765, 1776–77 (2015). The Supreme Court did not limit its qualified immunity analysis in *Mullenix* to the question of whether *some* facts distinguished *Mullenix* from the Court's most analogous precedents involving excessive-force claims in high-speed car chases, namely *Plumhoff*, *Scott v. Harris*, 550 U.S. 372 (2007), and *Brosseau v. Haugen*, 543 U.S. 194 (2004). Instead, the Court compared the factors relevant to the excessive-force inquiry in each case (emphasizing, in its analysis, the potential threat posed by the suspects in each case). *Mullenix*, 136 S. Ct. at 309–10. The Court concluded that "[t]he threat . . . posed was at least as immediate as that" in *Brosseau*, and that although the suspect in *Mullenix* passed fewer cars than those in *Plumhoff* and *Scott*, he had also expressly threatened to kill any police officers in his path. *Id.* at 310. In short, in coming to its conclusion that Mullenix did not violate clearly established law, the Court considered the specific facts of the case, compared those facts to the relevant facts in available precedential cases (with a heavy focus on the threat presented), and weighed whether those precedents would have placed a reasonable officer in

the one the panel applied to Kisela's claim of qualified immunity. After conducting that inquiry, the panel concluded that this case is, given the pertinent precedents, squarely within – indeed, at the more egregious border of – the group of precedents in which excessive force was found.

2. That conclusion was correct.

We have held unconstitutional the use of deadly force where an individual "did not point [a] gun at the officers and apparently was not facing them when they shot him the first time." *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). We have also held that deadly force is impermissible against an armed suspect "who makes no threatening movement" or "aggressive move of any kind," even where that suspect is suspected of killing a federal agent. *Harris v. Roderick*, 126 F.3d 1189, 1203 (9th Cir. 1997). "Law enforcement officers may not shoot to kill unless, *at a minimum*, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons." *Id.* at 1201 (emphasis added). We have held that a reasonable jury could find a constitutional violation, even concerning the use of nondeadly force, where an arrestee never attacked or even threatened to attack a police officer. *Smith v. City of Hemet*, 394 F.3d 689, 703–04 (9th Cir. 2005) (en banc). And we have held that "[e]very police officer should know that it is objectively unreasonable to shoot . . . an unarmed man who: has committed no serious offense, is mentally or

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Mullenix's position on notice that his actions were unlawful – precisely what the panel did in this case.

emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals," even where that individual had previously brandished weapons and threatened to "kick [a police officer's] ass." *Deorle*, 272 F.3d at 1277, 1285.

On the other side of the ledger, we have held that it is constitutionally permissible to shoot an armed, mentally disturbed individual who makes threatening movements; commits a nonviolent crime in view of police; is warned to drop his weapon and that he will be shot if he does not comply; not only ignores those commands but apparently "flaunt[s]" them; and then attempts to enter a private residence for which he has no key. *Blanford v. Sacramento Cty.*, 406 F.3d 1110, 1113, 1116–19 (9th Cir. 2005).

Taken together, our precedents as of May 21, 2010 suggest several factors critical to the constitutional analysis. These include the severity of the underlying crime, if any; whether the individual against whom force is used was armed, and if so, whether her movements suggested an immediate threat; whether a warning has been issued, if practicable, and particularly whether she has been warned of the imminent use of a significant degree of force; whether she complies with such warnings, ignores them, or actively flaunts them; whether she poses a risk of flight; whether she is mentally or emotionally disturbed; and whether she makes any threatening statements. None of these factors is dispositive, but each is relevant.

3. I turn, then, to the facts of this case taken in the light most favorable to Hughes, as we must do at the summary judgment stage. *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (per curiam). Kisela and two other police officers arrived at Hughes's residence in response to a "check welfare" call – not a report of a crime or a threatened crime. The call reported that a woman matching Hughes's description was seen hacking at a tree with a large knife.

Hughes emerged from her house holding a kitchen knife – an everyday household item which can be used as a weapon but ordinarily is a tool for safe, benign purposes. Although the dissent makes much of Hughes's "reportedly erratic" behavior, Hughes's demeanor when Kisela encountered her was in fact "composed and content," not "erratic," as she exited her home and walked down her driveway. She engaged in conversation with another woman, Sharon Chadwick, the content of which Kisela did not hear. The only officer who did hear Hughes speak stated that she seemed "unfocused," but was not shouting and did not appear angry.

The police did not observe Hughes making any verbal threats toward Chadwick or the police (who were safe behind a gated fence). Nor did Hughes raise the knife from her side, or make any threatening or aggressive movements. After initially approaching Chadwick, Hughes periodically walked *away* from Chadwick before reapproaching. Kisela and the other officers ordered Hughes to drop the knife, but the officers received no indication that Hughes heard them, as she did not acknowledge their presence. At no time did any officer orally identify himself or herself as

police (although they were in uniform), nor did they warn Hughes that they would shoot if she did not comply with their commands to drop the knife.[2] Nevertheless, within seconds after Hughes stepped out of her house, Kisela shot her four times.

On these facts – many of which the dissent elides or ignores – no officer could have reasonably believed in light of our precedents that Hughes's conduct justified the use of lethal force. As we held in *Deorle*, "[e]very police officer should know" that it is objectively unreasonable to shoot an unarmed, mentally disturbed person who has been given no warning about the imminent use of serious force, poses no risk of flight, and presents no objective imminent threat to the safety of others – even where that person had committed a

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[2] We have held, based on longstanding Supreme Court precedent, that "whenever practicable," such a warning "must be given before deadly force is employed." *Harris*, 126 F.3d at 1201–02 (citing *Garner*, 471 U.S. at 11–12). We have recently held, in a factual situation quite similar to that presented here, that a failure to warn a suspect that he would be fired upon if he did not comply with police instructions is an important factor in determining the reasonableness of force. *See Hayes v. Cty. of San Diego*, 736 F.3d 1223, 1234–35 (9th Cir. 2013). Hayes, like Hughes, was holding a knife; he was standing six feet away from San Diego County sheriff's deputies (roughly the same distance separating Hughes and Chadwick) and was walking toward them when the deputies opened fire. We held that "seen in the light most favorable to [the nonmoving party]," Hayes "posed no clear threat at the time he was shot without warning." *Id.* at 1235. *Cf. White*, 137 S. Ct. at 551, 552 (qualified immunity is warranted if an officer who arrives late on the scene and sees a suspect pointing a firearm at him could reasonably assume that proper police procedures such as officer identification and warning had already occurred).

minor criminal offense and threatened to assault a police officer, neither of which Hughes had done. 272 F.3d at 1285.

It is true that Hughes, unlike Deorle, held a kitchen knife. But it was down at her side, and she did not verbally threaten to "kick [a police officer's] ass" as Deorle did, nor did police have any basis for thinking she had committed a crime. *Id.* at 1277. Our case law clearly establishes that the use of deadly force against a suspect simply because he is holding a gun – even when that suspect is in proximity to police officers or other individuals, and even when that suspect has "committed a violent crime in the immediate past"– is not *ipso facto* reasonable, particularly when that gun is not pointed at another individual or otherwise wielded in a threatening fashion. *Harris*, 126 F.3d at 1203–04; *Curnow*, 952 F.2d at 325. Hughes was holding a kitchen knife – again, an item that can be used as a weapon but normally is not – not a gun. And on the facts favorable to Hughes, she never raised her knife, pointed it toward Chadwick, made any verbal threats, or moved in a threatening manner toward Chadwick.

Judge Ikuta's emphasis on Hughes's "reportedly erratic" behavior is crucial to the dissent's formulation of what it considers to be the relevant alleged constitutional right in this case. *See* Dissent at 22 ("The panel should have considered the alleged violation as: shooting a *reportedly erratic*, knife-wielding woman who comes within striking distance of a third party, ignores multiple [actually two] orders to drop her weapon, and cannot otherwise be timely subdued due to a physical barrier separating her from the officer.") (emphasis added). The "erratic" characterization is quite a thin

reed upon which to base a claim of qualified immunity, as the facts seen in the light most favorable to Hughes make clear that she did *not* act erratically once the officers arrived. Instead, she was "composed and content" and did *not* appear angry or disturbed.

It is certainly true that Hughes's earlier, reportedly "erratic," behavior toward a tree could be construed as an indicator of mental instability. But there is no basis in our case law for treating mental illness as an *aggravating* factor in evaluating the reasonableness of force employed. To the contrary, we have held that the apparent mental illness of a suspect weighs, if anything, in the opposite direction. *See Deorle*, 272 F.3d at 1283, 1285. The approach proposed in the dissent suggests the reverse: that an officer's use of deadly force is *more* reasonable where that officer is aware of an individual's mental instability. That approach not only violates our previous refusal "to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals," *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010), but turns *Deorle* on its head.

4. It is the dissent from denial of en banc consideration, not the panel opinion, that ignores the "specific context" in reaching its conclusion, despite the long-standing principle that at the summary judgment stage we are to make all reasonable inferences in favor of the nonmoving party. *Tolan*, 134 S. Ct. at 1868.

The dissent identifies four facts in maintaining that qualified immunity should have been granted – that Hughes held a kitchen knife in her hand, that she was within five or six feet of another woman, that she was "reportedly erratic," and that she did not respond to

two commands to drop the knife – to the exclusion of all other relevant circumstances and context. For example, the dissent ignores that Hughes held the knife calmly at her side, and did not raise it.[3] It ignores that Hughes was not suspected of having committed a crime. It ignores that Hughes made no threatening movements or statements. It ignores that Kisela, on the facts most favorable to Hughes, gave two warnings in quick succession, after failing to identify himself as a police officer and without any warning that he would open fire if Hughes did not comply with his instructions.

The dissent ultimately proposes that Kisela was entitled to qualified immunity for shooting Hughes because one purportedly analogous case, *Blanford*, found no constitutional violation. As the panel held, *Blanford* is simply inapposite. Several critical distinctions between the facts here and those present in *Blanford* confirm that a reasonable officer would not view *Blanford* as condoning the Hughes shooting.

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[3] The dissent incorrectly characterizes Hughes as "wielding" the knife, a term that suggests she had it in position for use as a weapon. *See* 20 Oxford English Dictionary 323–24 (2nd ed. 1989) (defining current sense of "to wield" as "[t]o use or handle with skill and effect; to manage, actuate, ply (a weapon, tool, or instrument, now always one held or carried in the hand"); Webster's New International Dictionary of the English Language 2924 (2nd ed. 1959) (defining "wield" as "[t]o use (an instrument, implement, etc.) with full command or power; to handle with skill, effectiveness, etc.; to employ, manipulate, or ply."). Hughes was just carrying a kitchen knife; she was not using it "with skill and effect," or actuating, plying, or employing it, as a weapon.

At the time he was shot, Blanford was carrying a two-and-a-half foot sword. *Blanford*, 406 F.3d at 1112–13. Swords, of course, are meant as weapons. In contrast, all the while the officers were present, Hughes was holding a large kitchen knife at her side; such a knife certainly *can* serve as a weapon but is usually employed as an ordinary culinary tool. In Blanford's case, the officers specifically identified themselves as law enforcement officials. *Id.* Kisela and the other officers did not do so orally. Officers expressly warned Blanford – repeatedly – that they would shoot him if he did not comply with orders to drop the sword. *Id.* at 1116–17,1119. Hughes received no such warning, although such a warning is required "where feasible." *Garner*, 471 U.S. at 11–12. *After* that warning, Blanford "appeared to flaunt the deputies' commands," as he then raised his sword and roared in a threatening manner. *Id.* at 1113, 1119. Hughes did not raise her knife from her side, and Kisela did not hear her say anything at all, much less roar in a threatening way. Blanford ignored repeated police commands over the course of roughly two minutes. *Id.* at 1114. Hughes was gunned down within thirty to forty-five seconds of Officer Kisela's arrival. Blanford had committed a (nonviolent) crime witnessed by the officers present. *Id.* at 1113, 1116. The officers here did not see Hughes commit any crime. Blanford was seen attempting to enter a private residence for which he had no key, facts probative of a possible home invasion. Here, the officers had no reason to think Hughes was entering someone else's house. She emerged from a house into a yard, and there was no reason to think it was not her house (which it was). No reasonable officer could conclude, even mistakenly, that *Blanford* sanctioned the shooting of Amy Hughes in this case.

In short, the panel opinion is a routine application of established qualified immunity principles to a set of facts that, under the applicable precedents, any reasonable officer should have realized did not justify the use of deadly force. Of course there was no precedent with *precisely* the same facts, but there nearly never is. On the dissent's approach, officers using excessive force would just about never be liable for doing so.

Indeed, the more egregious the use of excessive force, the less likely it is that deadly force would have been used in a closely similar situation, and the *more* likely is a grant of qualified immunity on the dissent's analysis. It is true that we could find no case in which a court held deadly force excessive where there was no threat made, verbally or physically, to anyone, and no crime committed. But almost surely that is because no reasonable officer would use deadly force under those circumstances.

I concur in the denial of rehearing en banc.

IKUTA, Circuit Judge, with whom KOZINSKI, TALLMAN, BYBEE, CALLAHAN, BEA, and N. R. SMITH, Circuit Judges, join, dissenting from denial of rehearing en banc:

The panel opinion that we let stand today directly contravenes the Supreme Court's repeated directive not to frame clearly established law in excessive force cases at too high a level of generality. *See, e.g.*, *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam). Rather than ask the correct question—whether Officer Kisela's split-second decision in "the specific context of the case" was "plainly incompetent" or "knowingly violate[d] the

law"—the panel opinion defines the "clearly established right" here at the highest level of generality: the right to be free of excessive force. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam). In doing so, the panel opinion adopts the same standard that the Supreme Court has repeatedly overruled. *Compare id.* at 309 ("The general principle that deadly force requires a sufficient threat hardly settles this matter."), *with Hughes v. Kisela*, 841 F.3d 1081, 1089 (9th Cir. 2016) (holding that the "most important[]" question is "whether it was reasonable to believe that Ms. Hughes presented a threat"). Because the panel opinion takes a path contrary to the Supreme Court's direction on the proper application of the qualified immunity doctrine in the Fourth Amendment context, I would take this case en banc to correct the panel opinion's error.

I

The relevant facts necessary to resolve the qualified immunity analysis are not in dispute. On May 21, 2010, Andrew Kisela was a corporal with the University of Arizona Police Department. That evening, he and his colleague received a radio report that a woman was walking down 7th Street in Tucson and hacking at a tree with a large knife. Upon arrival at the scene, Officer Kisela spoke briefly with the reporting party, and eventually a third officer arrived at the scene.

Against this backdrop, the incident at the center of this lawsuit unfolded in the course of thirty to forty-five seconds. Officer Kisela saw Amy Hughes—a woman matching the description of the tree-hacker—walking toward a third party, now known to be Hughes's housemate Sharon Chadwick. Hughes was still holding

the large knife, so the officers present drew their guns and ordered Hughes to drop the knife at least twice. Hughes failed to comply. Instead, she continued to approach Chadwick, and in fact came close enough to Chadwick to deliver a blow with the knife. With a chainlink fence separating the officers from Hughes and Chadwick, and with insufficient time to transition from his firearm to his taser, Officer Kisela fired four shots at Hughes, striking but not killing her.

Amy Hughes then filed this suit against Officer Kisela pursuant to 42 U.S.C. § 1983, alleging that Officer Kisela violated her Fourth Amendment right to be free of excessive force. The district court granted summary judgment for Officer Kisela, which the panel hearing this appeal reversed.

II

The dispositive question here is whether Officer Kisela is entitled to qualified immunity. As the Supreme Court has explained, the qualified immunity analysis has two prongs: In order to deny qualified immunity, the facts must establish a violation of a constitutional right, and that right must have been "clearly established" at the time of alleged violation. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). We may assess the prongs in either order, "in light of the circumstances in the particular case at hand." *Id.* at 236.

In a Fourth Amendment excessive force case, we analyze the first prong by engaging in "a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."

Plumhoff v. Rickard, 134 S. Ct. 2012, 2020 (2014) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). This is a "totality of the circumstances" analysis that we conduct from the perspective of a reasonable officer on the scene. *Id.* The analysis is accordingly quite deferential to the officer. *See Saucier v. Katz*, 533 U.S. 194, 205 (2001).

But the test for the second prong of the qualified immunity analysis is different and adds another layer of deference. *See id.* For excessive force cases in particular, the Supreme Court has identified two key principles about what constitutes a "clearly established" right. First, courts must define the alleged constitutional violation in terms of the officer's "*particular* conduct." *Mullenix*, 136 S. Ct. at 308 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). As *Mullenix* explained, "[s]uch specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Id.* (quoting *Saucier*, 533 U.S. at 205) (second alteration in original). Thus, courts may not define the clearly established right at a high level of generality that covers a wide range of conduct, as that would "mak[e] it impossible for officials reasonably [to] anticipate when their conduct may give rise to liability for damages." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quotation marks omitted) (second alteration in original).

Second, having identified the context-specific conduct that allegedly violated the Constitution, courts must determine whether any precedent existing at the

time placed *beyond debate* that the use of force in such circumstances violated the Fourth Amendment. *See, e.g.*, *White*, 137 S. Ct. at 551; *Mullenix*, 136 S. Ct. at 308. The "beyond debate" standard is a high one: Officers are entitled to qualified immunity unless "every reasonable official"—which excludes only the plainly incompetent and those who knowingly violate the law—"would have understood that what he is doing violates [the plaintiff's] right." *Mullenix*, 136 S. Ct. at 308 (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)). And officers remain entitled to qualified immunity even if they make "reasonable mistakes" about "the legal constraints on particular police conduct." *Saucier*, 533 U.S. at 205. Given this high standard, the Supreme Court has made clear that an official can lose qualified immunity in the excessive force context only if an earlier case held that conduct closely analogous to the specific conduct at issue violated a constitutional right. *E.g.*, *Mullenix*, 136 S. Ct. at 308. For example, the Court recently held that the Tenth Circuit "misunderstood the 'clearly established' analysis" when it "failed to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment," and instead relied on cases that "lay out excessive-force principles at only a general level." *White*, 137 S. Ct. at 552.

Mullenix illustrates both key principles of the second prong of the qualified immunity analysis. The officer in *Mullenix* was sued for using excessive force after he shot and killed an individual evading an arrest warrant who was speeding down the interstate. 136 S. Ct. at 306–07. The officer's objective was to disable the fleeing man's car by shooting it from an overpass,

a tactic that the officer had neither been trained in nor previously attempted. *Id.* at 306. In evaluating whether the officer violated clearly established law, the Court first explained the alleged violation in terms of the officer's specific conduct: The officer "confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer." *Id.* at 309.

After identifying this context-specific conduct, the Court then stated that "[t]he relevant inquiry is whether existing precedent placed the conclusion that [the officer] acted unreasonably in these circumstances 'beyond debate.'" *Id.* (quoting *al-Kidd*, 563 U.S. at 741). The Court concluded that it had "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity." *Id.* at 310. Because no Supreme Court case "squarely govern[ed]" the facts of *Mullenix*, *id.*, and lower court decisions left the question hazy, *id.* at 312, the Court could not say that it was "beyond debate" that the officer violated the plaintiff's constitutional right, *id.* (quoting *Stanton v. Sims*, 134 S.Ct. 3, 7 (2013) (per curiam)). Therefore, the officer was entitled to qualified immunity. *Id.*

III

The panel opinion directly contravenes the qualified immunity principles relevant to the "clearly established" inquiry. By doing so, the panel opinion fails to heed the central lesson of *White*, *Mullenix*, and multiple other Supreme Court decisions in the excessive force context.

First and most fundamentally, the panel opinion fails to define the alleged constitutional violation in terms of the officer's "*particular* conduct." *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 742). The panel should have considered the alleged violation as: shooting a reportedly erratic, knife-wielding woman who comes within striking distance of a third party, ignores multiple orders to drop her weapon, and cannot otherwise be timely subdued due to a physical barrier separating her from the officer. Instead, the panel defines the alleged violation at issue as shooting a plaintiff who "present[ed] no objectively reasonable threat to the safety of the officer or other individuals," *Hughes*, 841 F.3d at 1089 (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1285 (9th Cir. 2001)), and focuses solely on whether Officer Kisela was unreasonable in determining that Hughes posed a threat.[1] By defining the conduct at issue at such a high level of generality, the panel adopts the exact erroneous approach reversed in *Mullenix*, among other cases; it focuses only on the general elements of an excessive force violation. The abstract legal principle

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[1] According to the panel, this is the "most important[]" aspect of the qualified immunity determination because if the issue is determined in Hughes's favor, "then Corporal Kisela clearly violated [Hughes's] constitutional right." *Hughes*, 841 F.3d at 1089. Obviously, this part of the panel's analysis is relevant only to the first prong of the qualified immunity inquiry: whether the facts establish a violation of a constitutional right. But this is not the appropriate inquiry at the second prong, where the question is whether precedent placed "beyond debate" that the officer's "*particular* conduct" was unlawful "in light of the specific context of the case." *Mullenix*, 136 S. Ct. at 308.

that an officer may not use deadly force when a suspect does
not present an objectively reasonable threat is well established. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). But the proper question for purposes of identifying a "clearly established" right is whether any precedent placed beyond debate how this legal principle applies to the specific facts on the ground in this case. *See Mullenix*, 136 S. Ct. at 309. As the Supreme Court has made clear, at the second prong of the qualified immunity analysis we are not to focus on the reasonableness of the officer's conduct, but on whether the officer could reasonably have thought that the law permitted his specific conduct under the facts of the case. *See Saucier*, 533 U.S. at 205.

The opinion also mishandles the Court's second key principle for identifying clearly established law because it "fail[s] to identify a case where an officer acting under similar circumstances as Officer [Kisela] was held to have violated the Fourth Amendment." *White*, 137 S. Ct. at 552. Indeed, by relying on *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011), the panel tacitly admits that no precedent squarely governed these facts at the time of the officer's conduct. *Glenn*, which the panel calls "[t]he most analogous Ninth Circuit case," *Hughes*, 841 F.3d at 1088, post-dates the conduct at issue by more than a year. Needless to say, a case that was decided after Officer Kisela acted could not have informed his conduct, and so is "of no use in the clearly established inquiry."

Brosseau v. Haugen, 543 U.S. 194, 200 n.4 (2004) (per curiam).[2]

And indeed, no case that the panel cites held that conduct closely analogous to the conduct at issue in this case violated the plaintiff's constitutional rights. The panel's reliance on *Deorle*, *see Hughes*, 841 F.3d at 1089, is misplaced. In *Deorle*, we held that there was "no objectively reasonable threat to the safety of the officer or other individuals," 272 F.3d at 1285, where an unarmed man, *id.*, who had been compliant with at least three police requests to discard weapons, *id.* at 1276–77, was shot while walking toward an officer with a clear path of retreat, *id.* at 1282, while "the only neighbors in the vicinity, along with the other police officers, were safely behind [] two roadblocks," *id.* Given these facts, *Deorle* "does not clearly dictate the conclusion that [Officer Kisela] was unjustified in perceiving grave danger and responding accordingly" in the situation at issue here. *Mullenix*, 136 S. Ct. at 311. In stark contrast to *Deorle*, Officer Kisela was present at the scene for only a matter of seconds, while the officer in *Deorle* had been on the scene for forty minutes and had observed the victim "for about five to ten minutes from the cover of some trees." *Deorle*, 272

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[2] After we dissenting judges pointed out that *Glenn* was decided more than a year after the incident in this case, the panel belatedly amended its opinion to retreat from its reliance on *Glenn*. *See* Amended Op. at 44 n.2. But having now conceded that the panel's "most analogous Ninth Circuit case," *id.* at 43, is merely "suggestive of the state of the clearly established law," and serves only "as illustrative" rather than "as determinative of clearly established law," *id.* at 44 n.2, the panel opinion more clearly than ever rests on nothing but the general rule that deadly force requires an objective threat of harm.

F.3d at 1277, 1281–82. Hughes was not only armed (unlike Deorle), but also refused at least two requests to drop her knife (again unlike the largely compliant Deorle). Likewise, Hughes was within striking distance of a third party while separated from the officers by a physical barrier, and Officer Kisela had been put on notice of Hughes's earlier erratic behavior with a knife, which Officer Kisela had been dispatched to investigate. Shooting an armed, unresponsive, and reportedly erratic woman as she approaches a third party is materially different from shooting an unarmed, largely compliant man as he approaches an officer with a clear line of retreat. On its facts, therefore, *Deorle* does not place "beyond debate" that Officer Kisela's conduct violated Hughes's Fourth Amendment rights. *al-Kidd*, 563 U.S. at 741.

Worse yet, the panel's reliance on *Deorle* repeats the exact same error for which the Supreme Court reprimanded us just two years ago in *Sheehan*, in which the Court noted that the differences between *Deorle* and the situation confronting the officers in *Sheehan* "leap[t] from the page." *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015). For reasons just discussed, the same is true here. The Supreme Court went on to hold that, even if *Deorle* supported the general rule that an officer's forcible entry into a mentally ill individual's home requires an objective need for immediate entry, qualified immunity was appropriate because "*no precedent clearly established that there was not 'an objective need for immediate entry.'*" *Id.* at 1777 (emphasis in original). As in *Sheehan*, the panel here uses *Deorle* to justify denial of qualified immunity based on a violation of a general Fourth Amendment principle

that deadly force requires an objective threat, without citing a single relevant case in which *any* court has held that there was not an objective threat on facts comparable to those here.

The panel further exacerbates its error by brushing aside Officer Kisela's argument that a reasonable officer could rely on *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005), to justify the use of force in this situation. It is irrelevant whether *Blanford* is distinguishable, as the panel claims. *Hughes*, 841 F.3d at 1090. The issue is not whether *Blanford* compels the conclusion that Officer Kisela's conduct does not rise to the level of a constitutional violation (the first prong of the qualified immunity analysis). Rather, the question is whether any reasonable officer could have understood *Blanford*, rightly or wrongly, as permitting the use of deadly force in this situation. *See Saucier*, 533 U.S. at 205. On that score, the panel errs.

In *Blanford*, the officers confronted a man "wearing a ski mask and carrying a sword" walking through a suburban neighborhood and "behaving erratically." 406 F.3d at 1112. Over the course of approximately two minutes, *id.* at 1114, the officers trailed Blanford and repeatedly ordered him to drop the sword, which he did not do, *id.* at 1112–13. The officers "considered whether Blanford might be mentally disturbed," but they believed that he "posed an imminent threat" to the public and that they needed to secure his weapon, even though no third parties were known to be in the vicinity. *Id.* at 1113. When Blanford attempted to enter his own home, the officers—unaware that it was Blanford's home, and not knowing whether anyone was inside the home—shot him and severed his spine. *Id.* at

1113–14. We held that no constitutional violation occurred. *Id.* at 1117–18. More specifically, we identified the four elements of the situation that supported our holding: "[1] [Blanford] was armed, [2] refused to give up his weapon, [3] was not surrounded, and [4] was trying to get inside a private residence . . . where his sword could inflict injury that the deputies would not then be in a position to prevent." *Id.* at 1117–18.

Despite the panel's efforts to distinguish *Blanford*, *see Hughes*, 841 F.3d at 1090, the four elements that compelled our conclusion in *Blanford* are present in this case, and it is therefore clear that Officer Kisela could have reasonably relied on *Blanford* to justify his use of force against Hughes. *Cf. Mullenix*, 136 S. Ct. at 311 (looking to comparable decisions from the circuit courts to determine whether an officer's assessment of a threat was reasonable); *Shinault v. Hawks*, 782 F.3d 1053, 1060 (9th Cir. 2015) (holding that "qualified immunity is appropriate" where "some courts" held that no violation of a constitutional right occurred "in analogous cases," as this "shows that the right was not clearly established at the time of conduct"). Just as in *Blanford*, Hughes was armed, refused to drop her weapon, was not surrounded, and was attempting to put herself in a situation where she could have caused harm that the officers would not have been able to prevent. *See* 406 F.3d at 1117–18. Given our holding in *Blanford*, Officer Kisela could reasonably have thought that his conduct was lawful. For qualified immunity purposes, that is dispositive. *See Saucier*, 533 U.S. at 205.

Finally, the panel attempts to rescue its ruling by arguing that it should have been obvious to Officer Kisela that he could not use deadly force in this context. *Hughes*, 841 F.3d at 1090 (citing *Brosseau*, 543 U.S. at 199, which held that "in an obvious case," general Fourth Amendment standards "can 'clearly establish' the answer, even without a body of relevant case law"). In effect, the panel's argument here is that Officer Kisela's conduct constituted excessive force under general Fourth Amendment principles, and it is obvious that an officer may not use excessive force. *See id.* (characterizing as "obvious" that Hughes "had a constitutional right to walk down her driveway holding a knife without being shot"). Given that Hughes, as the panel acknowledges, "may have been acting erratically, was approaching a third party, and did not immediately comply with orders to drop the knife," *id.*, this is far from an obvious case. Indeed, if this case is obvious—especially in light of precedents like *Blanford* —then the "obvious case" exception will have swallowed the rule to identify a case that "squarely governs" the situation confronting the officer. *Mullenix*, 136 S. Ct. at 310.

All told, the panel opinion denies qualified immunity on the authority of a general Fourth Amendment principle, a post-dated case, and a wholly unpersuasive attempt to distinguish a precedent that held, on comparable facts, that no constitutional violation occurred. These errors are easily perceived, and we ought to have corrected them.

IV

The concurrence's last ditch effort to salvage the panel opinion is to no avail. *See* Concurrence to Denial

of Rehearing En Banc. Of course, a concurrence is not the opinion of the court, and is not a means by which this court can definitively speak on legal questions.[3] Moreover, the concurrence has no better luck than the panel in identifying precedent pre-dating Officer Kisela's use of force that is close enough to the situation facing Officer Kisela that only a plainly incompetent or lawless officer would know that his actions were unconstitutional. *See Mullenix*, 136 S. Ct. at 308.

First, the concurrence claims that this case is quite like *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), which addressed the infamous 1992 siege at Ruby Ridge. *See* Concurrence at 9, 13.[4] But the suggestion that Officer Kisela ought to have known that his conduct was unlawful because we held in the wake of Ruby Ridge that a sniper ensconced safely on a hill cannot shoot a retreating suspect merely because that suspect had committed a crime *the day before*, *see Harris*, 126 F.3d at 1203, does not pass the straight-face test. At a minimum, *Harris* does not place

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[3] As some of our colleagues on the Fifth Circuit recently observed, although a panel publishing a response to denial of rehearing en banc has "the right to comment on the dissent from denial," it cannot "articulate any additional binding precedent." *EEOC v. Bass Pro Outdoor World, LLC*, No. 15-20078, — F.3d —, 2017 WL 1540853, at *14 (5th Cir. Apr. 28, 2017) (Jones, J., dissenting from denial of rehearing en banc) (emphasis omitted).

[4] The panel follows suit by amending the opinion to remove a cite to *Glenn* and replace it with a cite to *Harris*, albeit without any explanation. *Compare Hughes*, 841 F.3d at 1090 ("As indicated by *Glenn* and *Deorle*, ..."), *with* Amended Op. at 47 ("As indicated by *Deorle* and *Harris*, ...").

it "beyond debate" that Officer Kisela violated the Constitution by using deadly force against a person who had been reported as acting erratically with a knife *minutes* before the encounter, was still armed with the knife, failed to respond to at least two orders to drop the knife, and was within striking distance of a third party. *White*, 137 S. Ct. at 551.

Equally unconvincing is the concurrence's reference to *Curnow ex rel. Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991). *See* Concurrence at 9, 13. On the facts as we assumed them in *Curnow*, the victim was sitting in his home, unarmed, and holding his girlfriend in his lap when a police officer shot him in the back through a window. *Id.* at 323. Whatever wisdom *Curnow* may impart to a policeman observing a person chopping onions at an innocent backyard barbecue, *see* Concurrence at 7–8, it does not clearly establish the unreasonableness of deadly force where a reportedly erratic individual who is unresponsive to police commands approaches a third party, knife in hand.

Finally, the concurrence points to distinctions between the facts of this case and those in *Blanford*, such as the length of the blade Blanford carried, the fact that the police shouted "we'll shoot" to Blanford in addition to an order to drop the weapon, and the length of the encounter (two minutes in *Blanford* rather than forty-five seconds in this case).[5] Concurrence at 15–16.

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[5] The concurrence fails to note other distinctions between *Blanford* and this case, such as the fact that Hughes was just a few feet away from a potential victim, whereas Blanford was 20 to 25 feet away from the police and there was no known third party at risk. *Blanford*, 406 F.3d at 1112–13. This distinction highlights the

Such distinctions might be more compelling if a federal judge could descend as a *deus ex machina* to whisper in the ears of officers on the scene about the application of precedent before a shot is ever fired. But in the world in which we actually live, officers must make split-second decisions regarding the use of force, and a reasonable officer could have understood *Blanford* as recognizing that deadly force could be used in the situation Officer Kisela faced.

V

By failing to take this case en banc, we unfortunately repeat our error of framing clearly established law at too high a level of generality, divorced from the specific context of the situation facing the officer. *Sheehan*, 135 S. Ct. at 1775–76 ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality."); *al-Kidd*, 563 U.S. at 742 (same; citation omitted); *Brosseau*, 543 U.S. 194, 198–99 (reversing the Ninth Circuit for relying on "the general tests" for excessive force to evaluate clearly established law).[6] More unfortunate still, we do so by

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need for even faster decision-making and action on Officer Kisela's part.

[6] Indeed, just days ago the Supreme Court rejected yet again this court's approach of defining clearly established law at too high a level of generality. *See Petersen v. Lewis County*, 663 F. App'x 531 (9th Cir. 2016), *cert. granted and judgment vacated sub nom. McKnight v. Peterson*, No. 16-1003, (U.S. June 12, 2017). In *Peterson*, a police officer responded to a 911 call reporting that an individual was using a large knife to stab the front door of a mobile home. *Petersen v. Lewis County*, No. C12-5908, 2014 WL 584005,

over-reading *Deorle*, the exact same case that we erroneously over-extended in *Sheehan*. The panel opinion that we leave in place contradicts *White*, *Mullenix*, *Sheehan*, *al-Kidd*, *Brosseau*, and multiple other Supreme Court precedents instructing us to "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *White*, 137 S. Ct. at 552.

The panel would have us believe this is all inconsequential—"[t]he application of qualified immunity," it assures us, simply "will depend upon the facts as determined by a jury." *Hughes*, 841 F.3d at 1090. But there is no set of facts for which Hughes has proffered evidence that would establish a clear violation of the Fourth Amendment as of the date of Officer Kisela's conduct, and qualified immunity is immunity *from suit*, not just a defense to liability. *Pearson*, 555 U.S. at 237. In this situation, "[o]ur grand business undoubtedly is . . . to do what lies clearly at hand." Thomas Carlyle, *Signs of the Times*, 49 Edinburgh Rev. 439, 439 (1829). Because it is apparent on the summary judgment

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at *1–2 (W.D. Wash. Feb. 13, 2014). The officer believed, incorrectly as it turned out, that the suspect had a knife. *Id.* at *2. The suspect failed to comply with the officer's orders to get on the ground and took two steps towards the officer, who was 20 to 25 feet away, at which point the officer shot the suspect to stop his approach. *Id.* *Petersen* defined clearly established law at a high level: it is clearly established that an officer may not use deadly force without probable cause to believe that the plaintiff posed a threat of serious physical harm, and the officer "did not have probable cause to use deadly force and therefore acted in violation of clearly established law." 663 F. App'x at 532. The panel here takes a similarly erroneous approach, and thus also invites vacatur, if not summary reversal.

record that qualified immunity, when properly applied, shields Officer Kisela from suit in this situation, I would afford him the immunity to which the law entitles him. I therefore dissent from the denial of rehearing en banc.

OPINION

SESSIONS, District Judge:

After receiving a report of a person hacking at a tree with a knife, three members of the University of Arizona Police Department (UAPD) responded to the scene. Upon their arrival, the officers saw Plaintiff Amy Hughes carrying a large kitchen knife. Ms. Hughes then began to walk toward another woman, Sharon Chadwick, at which point the police yelled for her to drop the knife. Ms. Hughes did not comply. Ms. Chadwick has submitted an affidavit in which she describes Ms. Hughes's demeanor at the time as composed and non-threatening. Multiple witnesses attest that Ms. Hughes never raised the knife as she neared Ms. Chadwick. Unable to approach the two women because of a chain-link fence, defendant and UAPD Corporal Andrew Kisela shot Ms. Hughes four times.

Ms. Hughes brings suit under 42 U.S.C. § 1983 claiming excessive force in violation of her constitutional rights. The district court granted summary judgment in favor of Corporal Kisela, concluding that his actions were reasonable and that he was entitled to qualified immunity. The facts when viewed in the light most favorable to Ms. Hughes do not support the district court's decision. We reverse and remand for further proceedings.

FACTUAL BACKGROUND

On May 21, 2010, Corporal Kisela and UAPD officer-in-training Alex Garcia were monitoring the Tucson Police Department radio when they heard a "check welfare" call regarding a woman reportedly hacking at a tree with a large knife. The officers drove to the location and were told by the reporting party that the person with the knife had been acting erratically. UAPD Officer Lindsay Kunz also responded to the call.

The following events occurred in less than one minute. Soon after the three officers arrived, Amy Hughes emerged from her house carrying a large kitchen knife. Sharon Chadwick was standing outside the house in the vicinity of the driveway. According to Ms. Chadwick's affidavit, Ms. Hughes was composed and content as she exited the house, holding the kitchen knife down to her side with the blade pointing backwards. Ms. Chadwick submits that she was never in fear, and did not feel that Ms. Hughes was a threat.

As Ms. Hughes approached Ms. Chadwick, the officers each drew their guns and ordered her to drop the knife. Although Corporal Kisela contends that the officers yelled numerous time for Ms. Hughes to drop the knife, Ms. Chadwick recalls hearing only two commands in quick succession. Ms. Hughes did not drop the knife and continued to move toward Ms. Chadwick. Corporal Kisela recalls seeing Ms. Hughes raise the knife as if to attack. Officers Garcia and Kunz later told investigators that they did not see Ms. Hughes raise the knife.

A chain link fence at the edge of the property prevented the officers from getting any closer to the two women. Because the top of the fence obstructed his aim, Corporal Kisela dropped down and fired four shots through the fence. Each of the shots struck Ms. Hughes, causing her to fall at Ms. Chadwick's feet. Her injuries were not fatal.

In an interview with police after the shooting, Ms. Chadwick explained that she and Ms. Hughes lived together, and that she had managed Ms. Hughes's behavior in the past. She also informed police that Ms. Hughes had been diagnosed with bipolar disorder and was taking medication. Ms. Chadwick believes that Ms. Hughes did not understand what was happening when the police yelled for her to drop the knife. She also believes that Ms. Hughes would have given her the knife if asked, and that the police should have afforded her that opportunity.

STANDARD OF REVIEW

A district court's grant of a motion for summary judgment is reviewed de novo. *Colwell v. Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014). "Summary judgment is appropriate only 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Stoot v. City of Everett*, 582 F.3d 910, 918 (9th Cir. 2009) (quoting Fed. R. Civ. P. 56(c)). In reviewing a summary judgment ruling, we draw all reasonable inferences in favor of the non-moving party. *Galvin v. Hay*, 374 F.3d 739, 745 (9th Cir. 2004). We are obligated to construe the record in the light most favorable to the party opposing summary judgment.

See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). We review an officer's entitlement to qualified immunity de novo. *Glenn v. Washington Cty.*, 673 F.3d 864, 870 (9th Cir. 2011).

DISCUSSION

I. Excessive Force

When evaluating a Fourth Amendment claim of excessive force, courts ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham v. Connor*, 490 U.S. 386, 397 (1989). This inquiry "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97. Reasonableness therefore "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

The strength of the government's interest in the force used is evaluated by examining three primary factors: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether [s]he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (citing *Garner*, 471 U.S. at 8–9). The "'most important' factor under *Graham* is whether

the suspect posed an 'immediate threat to the safety of officers or third parties.'" *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013) (quoting *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010)).

The factors identified in *Graham* are not exclusive. *See Bryan*, 630 F.3d at 826. When assessing the officer's conduct, a court must examine "the totality of the circumstances and consider 'whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.'" *Id.* (quoting *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994)). Other relevant factors may include the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officer that the subject of the force used was mentally disturbed. *See, e.g.*, *Bryan*, 630 F.3d at 831; *Deorle v. Rutherford*, 272 F.3d 1272, 1282–83 (9th Cir. 2001). With respect to the possibility of less intrusive force, officers need not employ the least intrusive means available so long as they act within a range of reasonable conduct. *See Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

In this case, when viewing the facts in the light most favorable to Ms. Hughes, the record does not support Corporal Kisela's perception of an immediate threat. Officer Garcia told Tucson police that Ms. Hughes did not raise the knife and did not make any aggressive or threatening actions toward Ms. Chadwick. Officer Kunz similarly did not see Ms. Hughes raise her arm. Ms. Chadwick describes Ms.

Hughes as having been composed and non-threatening immediately prior to the shooting.[1]

Corporal Kisela was undoubtedly concerned for Ms. Chadwick's safety. He had received a report of a person with a knife acting erratically, and soon thereafter saw that same person still holding a knife and approaching another individual. In some situations, "[i]f the person is armed . . . a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." *George*, 736 F.3d at 838. Nonetheless, "a simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Deorle*, 272 F.3d at 1281 ("A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury."); *see also Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) ("Law enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed."). Here, viewing those "objective factors" in a light most favorable to Ms. Hughes, a rational jury could find that she did not present an immediate threat to the safety of others, and that Corporal Kisela's response was unreasonable. *Id.*

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[1] While Ms. Chadwick's description may not be entirely consistent with some of her other statements in the record, "we must draw all justifiable inferences in favor of [Ms. Hughes], including questions of credibility and of the weight to be accorded particular evidence." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991).

The question of the severity of the crime being committed also weighs in Ms. Hughes's favor. The three officers present at the time of the shooting were responding to a "check welfare" call. No crime was reported. As in *Deorle*, where the police shot a mentally ill man acting strangely, the officers arrived "not to arrest [Ms. Hughes], but to investigate [her] peculiar behavior." 272 F.3d at 1280–81. And also as in *Deorle*, this was not a situation of a "lone police officer suddenly confronted by a dangerous armed felon . . . ." *Id.* at 1283. The majority in *Deorle* noted that "[t]he character of the offense is often an important consideration in determining whether the use of force was justified," and ultimately concluded that "where the crime being committed, if any, was minor and the danger to . . . others appear to have been minimal," the governmental interest in using force was "clearly not substantial." *Id.* at 1280–82. A rational jury, viewing the facts in a light most favorable to Ms. Hughes, could reach the same conclusion here.

The third factor cited in *Graham*, whether the suspect was resisting or seeking to evade arrest, does not apply as the events in this case occurred too quickly for the officers to make an arrest attempt. A related issue is Ms. Hughes's disregard of the officers' commands to drop the knife. It is undisputed that officers yelled at least twice for her to drop the knife. If the case goes to trial, the jury may hear evidence of several additional warnings. At summary judgment, however, the Chadwick affidavit plays an important role on this point. Ms. Chadwick heard only two warnings in quick succession, and perceived that Ms. Hughes did not understand what was happening.

Whether the police should have perceived this is a question for the jury.

At the time, the police were privy to facts suggesting that Ms. Hughes might have a mental illness. The initial report was to "check welfare" of a person trying to cut down a tree with a knife. Upon arriving at the scene, the reporting party informed Corporal Kisela that this same person was acting erratically. Just prior to the shooting, Corporal Kisela himself recalled Ms. Hughes "stumbling" toward Ms. Chadwick.

This Court has "refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals." *Bryan*, 630 F.3d at 829. The Court has, however, "found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual." *Id.* (citation and internal quotation marks omitted). A reasonable jury could conclude, based upon the information available to Corporal Kisela at the time, that there were sufficient indications of mental illness to diminish the governmental interest in using deadly force.

Another factor to be considered is whether there were less intrusive means that could have been used before employing deadly force. As noted previously, officers "need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable." *Henrich*, 39 F.3d at 915. However, "police are 'required to consider [w]hat other

tactics if any were available,'" and whether there are "clear, reasonable and less intrusive alternatives" to the force being contemplated. *Bryan*, 630 F.3d at 831 (quoting *Headwaters Forest Def. v. Cty. of Humboldt*, 240 F.3d 1185, 1204 (9th Cir. 2000)); *see also Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005) (holding that officers should consider "alternative techniques available for subduing [a suspect] that presented a lesser threat of death or serious injury").

In this case, the record includes expert opinions about the reasonableness of using a firearm in this situation. Ms. Hughes's expert concluded that Corporal Kisela should have used his Taser, and that shooting through the fence was both dangerous and excessive. Corporal Kisela's expert opined that a Taser would likely have become tangled in the fence, and that the shooting was reasonable. It is well established that a jury may hear expert testimony in this type of case, and rely upon such evidence in assessing whether the officer's use of force was unreasonable. *See Larez v. City of Los Angeles*, 946 F.2d 630, 635 (9th Cir. 1991) (as amended) (finding that testimony of "an expert on proper police procedures and policies" was relevant and admissible). Here, the differences in the experts' opinions reinforce our conclusion that there are questions for a jury to consider in determining whether Ms. Hughes's constitutional rights were violated.

This Court has noted that "[b]ecause [the question of excessive force] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted

sparingly." *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002); *see also Liston v. Cty. of Riverside*, 120 F.3d 965, 976 n.10 (9th Cir. 1997) (as amended) ("We have held repeatedly that the reasonableness of force used is ordinarily a question of fact for the jury."). This is such a case. Material questions of fact, such as the severity of the threat, the adequacy of police warnings, and the potential for less intrusive means are plainly in dispute. *See, e.g.*, *City of Hemet*, 394 F.3d at 703 ("Considering the severity and extent of the force used, the three basic *Graham* factors, and the availability of other means of accomplishing the arrest, it is evident that the question whether the force used here was reasonable is a matter that cannot be resolved in favor of the defendants on summary judgment."). Corporal Kisela is not entitled to summary judgment with respect to the reasonableness of his actions.

II. Qualified Immunity

The district court determined that because Corporal Kisela acted reasonably, it need not reach the question of qualified immunity. Nonetheless, the court commented that "under the totality of the circumstances and the standard of whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted, it appears that [Corporal Kisela's] conduct was reasonable; [Corporal Kisela] would therefore be entitled to qualified immunity." As discussed above, there are questions of fact in dispute that foreclose a finding of reasonableness as a matter of law. We therefore undertake a qualified immunity analysis.

The Supreme Court has explained that "[t]he doctrine of qualified immunity protects government

officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity shields an officer from liability even if his or her actions resulted from "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)). The purpose of qualified immunity is to strike a balance between the competing "need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. Al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

"In determining whether an officer is entitled to qualified immunity, we consider (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014) (citing *Pearson*, 555 U.S. at 232). Consequently, at summary judgment, an officer may be denied qualified immunity in a Section 1983 action "only if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right, and (2) the right at issue was

clearly established at the time of the incident such that a reasonable officer would have understood [his] conduct to be unlawful in that situation." *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

Here, the question of a constitutional violation involves disputed facts which, when viewed most favorably to Ms. Hughes, could support a rational jury finding in her favor. We therefore move to the second question: whether the right at issue was clearly established such that a reasonable officer would have understood his actions were unlawful. The law does not "require a case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate." *al-Kidd*, 563 U.S. at 740. That said, this Court has acknowledged that qualified immunity may be denied in novel circumstances. *See Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011) (en banc) (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). "Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." *Deorle*, 272 F.3d at 1286; *see also Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (stating that "in an obvious case, these [*Graham*] standards can 'clearly establish' the answer, even without a body of relevant case law").

The most analogous Ninth Circuit case is *Glenn*, 673 F.3d 864, in which an eighteen-year-old man was shot in his driveway by police officers. Police received a report of an agitated, intoxicated man carrying a pocket knife and threatening to kill himself. Although at least one officer was told that the man had calmed down, when police saw him holding the knife to his own

neck they drew their guns and screamed for him to drop it. Additional officers arrived at the scene, one of whom shot the man with several beanbags. The impact of the beanbags caused the man to move away from the beanbag fire and toward the house in which his parents were standing. As police had determined that if the man "made a move toward the house with his parents inside, they would use deadly force," they opened fire and killed him. *Glenn*, 673 F.3d at 869.

Glenn is similar to this case in several respects. For example: it was not clear that the decedent in *Glenn* was actually threatening anyone; no serious crime was being committed; there was no effort to resist or evade arrest aside from failing to put down the knife; the failure to drop the knife may have been the result of confusion by an impaired person; and it might have been reasonable to use less intrusive force. Although the district court had granted summary judgment, this Court remanded *Glenn* for a jury trial.[2] *Id.* at 879–80.

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[2] *Glenn* was decided on summary judgment after the incident that gave rise to this case. It concerned a shooting that occurred in 2006. The panel in *Glenn* concluded that "resolution of . . . [genuine factual] issues is crucial to a proper determination of the officers' entitlement to qualified immunity," and remanded the question whether the right was clearly established at the time of the alleged misconduct, to be decided "after the material factual disputes have been decided by the jury." 673 F.3d at 871. Although the panel stated that it was "[expressing] no opinion on the second part of the qualified immunity analysis," the remand for trial would have been improper were the officers entitled to qualified immunity on the facts most favorable to the plaintiff. *See Mattos*, 661 F.3d at 445–48, 452. We therefore read *Glenn* as at least suggestive of the state of the clearly established law at the time it was decided.

Deorle, 272 F.3d 1272, also offers similar facts, though the plaintiff in *Deorle* was acting far more strangely than Ms. Hughes. In *Deorle*, an officer responded to a call about an individual who was drunk and behaving erratically. At different points, the man brandished a hatchet, shouted "kill me," threatened to "kick [a police officer's] ass," and walked around with an unloaded cross-bow. 272 F.3d at 1276–77. Police observed him for five to ten minutes before the man began walking towards an officer with a bottle of lighter fluid. At that point the officer fired a bean bag, permanently blinding the man and fracturing his skull in several places. *Id.* at 1277–78.

As in this case, police in *Deorle* were at the scene to investigate peculiar behavior. Some sort of mental impairment was evident, the suspect was not trying to escape, and the risk of imminent harm was in question. In denying the officer's qualified immunity defense, this Court wrote:

> Every police officer should know that it is objectively unreasonable to shoot . . . an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reason-

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In any event, we rely on *Glenn* as illustrative, not as indicative of the clearly established law in 2010. *See* Berzon, J., concurring in the denial of rehearing en banc, at 9–12.

> able threat to the safety of the officer or other individuals.

Id. at 1285.

Here, several of those same determinations are in dispute, namely: whether Corporal Kisela was reasonable in believing that the kitchen knife was a weapon; whether he should have suspected mental health issues; whether the warning was sufficient; and most importantly, whether it was reasonable to believe that Ms. Hughes presented a threat to Ms. Chadwick's safety. If those questions are determined in Ms. Hughes's favor, then Corporal Kisela clearly violated her constitutional right.

Corporal Kisela claims support to the contrary from *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005), in which police had received reports of a man in a ski mask carrying a sword through a suburban residential neighborhood. But that case could not reasonably be relied upon as justifying shooting Ms. Hughes. Mr. Blanford was carrying a two-and-a-half-foot-long Civil War-era cavalry saber and made "a loud growling or roaring sound." *Blanford*, 406 F.3d at 1113. He then walked toward a residence and tried to enter after searching his pockets for keys. Unsuccessful, he turned to a walkway, saw the police officers with guns drawn, and heard them order him to drop the sword. The police shot the man as he rounded the far corner of the house, then again as he tried to enter through another door. After the man continued walking, police fired a third time and severed his spine, rendering him a paraplegic. On those facts, the Court found that the officers were entitled to qualified immunity. *Id.* at 1119.

This case, when viewing the facts in Ms. Hughes's favor, differs from *Blanford* in several critical respects. Most importantly, in contrast to a clearly disturbed man carrying a sword, Ms. Hughes held a kitchen knife—which has a perfectly benign primary use—down at her side, and according to Ms. Chadwick's affidavit, did not appear either angry or menacing. The only information the police had regarding her use of the knife was that she was carving a tree, not that she was threatening or hurting a person. Mr. Blanford plainly disregarded police orders to drop the weapon. Here, it was apparent to Ms. Chadwick, and there is a fact issue whether it should have been evident to the police, that Ms. Hughes did not understand what was happening when they yelled for her to drop the knife. And in *Blanford* the suspect actively evaded police, while Ms. Hughes made no such attempt to get away.

The application of qualified immunity in this case will depend upon the facts as determined by a jury. The facts, viewed in Ms. Hughes's favor, present the police shooting a woman who was committing no crime and holding a kitchen knife. While the woman with the knife may have been acting erratically, was approaching a third party, and did not immediately comply with orders to drop the knife, a rational jury—again accepting the facts in the light most favorable to Ms. Hughes—could find that she had a constitutional right to walk down her driveway holding a knife without being shot. As indicated by *Deorle* and *Harris*, as well as the Supreme Court's reference to the "obvious case," *Brosseau*, 543 U.S. at 199, that right was clearly established. Based on the disputed facts, Corporal Kisela is not entitled to qualified immunity.

CONCLUSION

We therefore reverse the district court's grant of summary judgment and remand for a jury to determine whether Corporal Kisela's use of deadly force was lawful.

REVERSED AND REMANDED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-15059
D.C. No. 4:11-cv-00366-FRZ

[Filed November 28, 2016]

AMY HUGHES,
Plaintiff-Appellant,

v.

ANDREW KISELA, Corporal, 0203; individually and in his official capacity,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, District Judge, Presiding

Argued and Submitted September 12, 2016
San Francisco, California

Filed November 28, 2016

Before: Ronald M. Gould and Marsha S. Berzon, Circuit Judges, and William K. Sessions III,* District Judge.

Opinion by Judge Sessions

SUMMARY**

Civil Rights

The panel reversed the district court's summary judgment in favor of a University of Arizona police officer and remanded in a 42 U.S.C. § 1983 action in which plaintiff alleged that the officer used excessive force when he shot her four times.

After receiving a report of a person hacking at a tree with a knife, police officers responded to the scene and upon their arrival saw plaintiff carrying a large kitchen knife. Plaintiff began walking toward another woman and did not comply with the officers' demands to drop the knife. Unable to approach the two women because of a chain-link fence, defendant shot plaintiff four times.

The panel held that material questions of fact, such as the severity of the threat, the adequacy of police warnings, and the potential for less intrusive means were plainly in dispute. Defendant therefore was not entitled to summary judgment with respect to the reasonableness of his actions.

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* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel further held that defendant was not entitled to qualified immunity. The panel determined that the facts, viewed in plaintiff's favor, presented the police shooting a woman who was committing no crime and holding a kitchen knife. While the woman with the knife may have been acting erratically, was approaching a third party, and did not immediately comply with orders to drop the knife, a rational jury—accepting the facts in the light most favorable to plaintiff—could find that she had a constitutional right to walk down her driveway holding a knife without being shot.

COUNSEL

Vince Rabago (argued) and Stacy Scheff, Vince Rabago Law Office PLC, Tucson, Arizona, for Plaintiff-Appellant.

Robert R. McCright (argued), Assistant Attorney General; Thomas C. Horne, Arizona Attorney General; Office of the Attorney General, Tucson, Arizona; for Defendant-Appellee.

OPINION

SESSIONS, District Judge:

After receiving a report of a person hacking at a tree with a knife, three members of the University of Arizona Police Department (UAPD) responded to the scene. Upon their arrival, the officers saw Plaintiff Amy Hughes carrying a large kitchen knife. Ms. Hughes then began to walk toward another woman, Sharon Chadwick, at which point the police yelled for her to drop the knife. Ms. Hughes did not comply. Ms. Chadwick has submitted an affidavit in which she describes Ms. Hughes's demeanor at the time as

composed and non-threatening. Multiple witnesses attest that Ms. Hughes never raised the knife as she neared Ms. Chadwick. Unable to approach the two women because of a chain-link fence, defendant and UAPD Corporal Andrew Kisela shot Ms. Hughes four times.

Ms. Hughes brings suit under 42 U.S.C. § 1983 claiming excessive force in violation of her constitutional rights. The district court granted summary judgment in favor of Corporal Kisela, concluding that his actions were reasonable and that he was entitled to qualified immunity. The facts when viewed in the light most favorable to Ms. Hughes do not support the district court's decision. We reverse and remand for further proceedings.

FACTUAL BACKGROUND

On May 21, 2010, Corporal Kisela and UAPD officer-in-training Alex Garcia were monitoring the Tucson Police Department radio when they heard a "check welfare" call regarding a woman reportedly hacking at a tree with a large knife. The officers drove to the location and were told by the reporting party that the person with the knife had been acting erratically. UAPD Officer Lindsay Kunz also responded to the call.

The following events occurred in less than one minute. Soon after the three officers arrived, Amy Hughes emerged from her house carrying a large kitchen knife. Sharon Chadwick was standing outside the house in the vicinity of the driveway. According to Ms. Chadwick's affidavit, Ms. Hughes was composed and content as she exited the house, holding the

kitchen knife down to her side with the blade pointing backwards. Ms. Chadwick submits that she was never in fear, and did not feel that Ms. Hughes was a threat.

As Ms. Hughes approached Ms. Chadwick, the officers each drew their guns and ordered her to drop the knife. Although Corporal Kisela contends that the officers yelled numerous time for Ms. Hughes to drop the knife, Ms. Chadwick recalls hearing only two commands in quick succession. Ms. Hughes did not drop the knife and continued to move toward Ms. Chadwick. Corporal Kisela recalls seeing Ms. Hughes raise the knife as if to attack. Officers Garcia and Kunz later told investigators that they did not see Ms. Hughes raise the knife.

A chain link fence at the edge of the property prevented the officers from getting any closer to the two women. Because the top of the fence obstructed his aim, Corporal Kisela dropped down and fired four shots through the fence. Each of the shots struck Ms. Hughes, causing her to fall at Ms. Chadwick's feet. Her injuries were not fatal.

In an interview with police after the shooting, Ms. Chadwick explained that she and Ms. Hughes lived together, and that she had managed Ms. Hughes's behavior in the past. She also informed police that Ms. Hughes had been diagnosed with bipolar disorder and was taking medication. Ms. Chadwick believes that Ms. Hughes did not understand what was happening when the police yelled for her to drop the knife. She also believes that Ms. Hughes would have given her the knife if asked, and that the police should have afforded her that opportunity.

STANDARD OF REVIEW

A district court's grant of a motion for summary judgment is reviewed de novo. *Colwell v. Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014). "Summary judgment is appropriate only 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Stoot v. City of Everett*, 582 F.3d 910, 918 (9th Cir. 2009) (quoting Fed. R. Civ. P. 56(c)). In reviewing a summary judgment ruling, we draw all reasonable inferences in favor of the non-moving party. *Galvin v. Hay*, 374 F.3d 739, 745 (9th Cir. 2004). We are obligated to construe the record in the light most favorable to the party opposing summary judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). We review an officer's entitlement to qualified immunity de novo. *Glenn v. Washington Cty.*, 673 F.3d 864, 870 (9th Cir. 2011).

DISCUSSION

I. Excessive Force

When evaluating a Fourth Amendment claim of excessive force, courts ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham v. Connor*, 490 U.S. 386, 397 (1989). This inquiry "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). "The calculus of reasonableness must embody allowance for the fact

that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97. Reasonableness therefore "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

The strength of the government's interest in the force used is evaluated by examining three primary factors: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether [s]he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (citing *Garner*, 471 U.S. at 8–9). The "'most important' factor under *Graham* is whether the suspect posed an 'immediate threat to the safety of officers or third parties.'" *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013) (quoting *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010)).

The factors identified in *Graham* are not exclusive. *See Bryan*, 630 F.3d at 826. When assessing the officer's conduct, a court must examine "the totality of the circumstances and consider 'whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.'" *Id.* (quoting *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994)). Other relevant factors may include the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officer that the subject of the force used was mentally disturbed. *See, e.g., Bryan*, 630 F.3d at 831; *Deorle v. Rutherford*, 272 F.3d 1272, 1282–83 (9th Cir. 2001). With respect to the possibility of less intrusive force,

officers need not employ the least intrusive means available so long as they act within a range of reasonable conduct. *See Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

In this case, when viewing the facts in the light most favorable to Ms. Hughes, the record does not support Corporal Kisela's perception of an immediate threat. Officer Garcia told Tucson police that Ms. Hughes did not raise the knife and did not make any aggressive or threatening actions toward Ms. Chadwick. Officer Kunz similarly did not see Ms. Hughes raise her arm. Ms. Chadwick describes Ms. Hughes as having been composed and non-threatening immediately prior to the shooting.[1]

Corporal Kisela was undoubtedly concerned for Ms. Chadwick's safety. He had received a report of a person with a knife acting erratically, and soon thereafter saw that same person still holding a knife and approaching another individual. In some situations, "[i]f the person is armed . . . a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." *George*, 736 F.3d at 838. Nonetheless, "a simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Deorle*, 272 F.3d at 1281 ("A desire to resolve quickly a

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[1] While Ms. Chadwick's description may not be entirely consistent with some of her other statements in the record, "we must draw all justifiable inferences in favor of [Ms. Hughes], including questions of credibility and of the weight to be accorded particular evidence." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991).

potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury."); *see also Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) ("Law enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed."). Here, viewing those "objective factors" in a light most favorable to Ms. Hughes, a rational jury could find that she did not present an immediate threat to the safety of others, and that Corporal Kisela's response was unreasonable. *Id.*

The question of the severity of the crime being committed also weighs in Ms. Hughes's favor. The three officers present at the time of the shooting were responding to a "check welfare" call. No crime was reported. As in *Deorle*, where the police shot a mentally ill man acting strangely, the officers arrived "not to arrest [Ms. Hughes], but to investigate [her] peculiar behavior." 272 F.3d at 1280–81. And also as in *Deorle*, this was not a situation of a "lone police officer suddenly confronted by a dangerous armed felon . . . ." *Id.* at 1283. The majority in *Deorle* noted that "[t]he character of the offense is often an important consideration in determining whether the use of force was justified," and ultimately concluded that "where the crime being committed, if any, was minor and the danger to . . . others appear to have been minimal," the governmental interest in using force was "clearly not substantial." *Id.* at 1280–82. A rational jury, viewing the facts in a light most favorable to Ms. Hughes, could reach the same conclusion here.

The third factor cited in *Graham*, whether the suspect was resisting or seeking to evade arrest, does not apply as the events in this case occurred too quickly for the officers to make an arrest attempt. A related issue is Ms. Hughes's disregard of the officers' commands to drop the knife. It is undisputed that officers yelled at least twice for her to drop the knife. If the case goes to trial, the jury may hear evidence of several additional warnings. At summary judgment, however, the Chadwick affidavit plays an important role on this point. Ms. Chadwick heard only two warnings in quick succession, and perceived that Ms. Hughes did not understand what was happening. Whether the police should have perceived this is a question for the jury.

At the time, the police were privy to facts suggesting that Ms. Hughes might have a mental illness. The initial report was to "check welfare" of a person trying to cut down a tree with a knife. Upon arriving at the scene, the reporting party informed Corporal Kisela that this same person was acting erratically. Just prior to the shooting, Corporal Kisela himself recalled Ms. Hughes "stumbling" toward Ms. Chadwick.

This Court has "refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals." *Bryan*, 630 F.3d at 829. The Court has, however, "found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual." *Id.* (citation and internal

quotation marks omitted). A reasonable jury could conclude, based upon the information available to Corporal Kisela at the time, that there were sufficient indications of mental illness to diminish the governmental interest in using deadly force.

Another factor to be considered is whether there were less intrusive means that could have been used before employing deadly force. As noted previously, officers "need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable." *Henrich*, 39 F.3d at 915. However, "police are 'required to consider [w]hat other tactics if any were available,'" and whether there are "clear, reasonable and less intrusive alternatives" to the force being contemplated. *Bryan*, 630 F.3d at 831 (quoting *Headwaters Forest Def. v. Cty. of Humboldt*, 240 F.3d 1185, 1204 (9th Cir. 2000)); *see also Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005) (holding that officers should consider "alternative techniques available for subduing [a suspect] that presented a lesser threat of death or serious injury").

In this case, the record includes expert opinions about the reasonableness of using a firearm in this situation. Ms. Hughes's expert concluded that Corporal Kisela should have used his Taser, and that shooting through the fence was both dangerous and excessive. Corporal Kisela's expert opined that a Taser would likely have become tangled in the fence, and that the shooting was reasonable. It is well established that a jury may hear expert testimony in this type of case, and rely upon such evidence in assessing whether the officer's use of force was unreasonable. *See Larez v.*

City of Los Angeles, 946 F.2d 630, 635 (9th Cir. 1991) (as amended) (finding that testimony of "an expert on proper police procedures and policies" was relevant and admissible). Here, the differences in the experts' opinions reinforce our conclusion that there are questions for a jury to consider in determining whether Ms. Hughes's constitutional rights were violated.

This Court has noted that "[b]ecause [the question of excessive force] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly." *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002); *see also Liston v. Cty. of Riverside*, 120 F.3d 965, 976 n.10 (9th Cir. 1997) (as amended) ("We have held repeatedly that the reasonableness of force used is ordinarily a question of fact for the jury."). This is such a case. Material questions of fact, such as the severity of the threat, the adequacy of police warnings, and the potential for less intrusive means are plainly in dispute. *See, e.g.*, *City of Hemet*, 394 F.3d at 703 ("Considering the severity and extent of the force used, the three basic *Graham* factors, and the availability of other means of accomplishing the arrest, it is evident that the question whether the force used here was reasonable is a matter that cannot be resolved in favor of the defendants on summary judgment."). Corporal Kisela is not entitled to summary judgment with respect to the reasonableness of his actions.

II. Qualified Immunity

The district court determined that because Corporal Kisela acted reasonably, it need not reach the question

of qualified immunity. Nonetheless, the court commented that "under the totality of the circumstances and the standard of whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted, it appears that [Corporal Kisela's] conduct was reasonable; [Corporal Kisela] would therefore be entitled to qualified immunity." As discussed above, there are questions of fact in dispute that foreclose a finding of reasonableness as a matter of law. We therefore undertake a qualified immunity analysis.

The Supreme Court has explained that "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity shields an officer from liability even if his or her actions resulted from "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)). The purpose of qualified immunity is to strike a balance between the competing "need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate

the law.'" *Ashcroft v. Al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

"In determining whether an officer is entitled to qualified immunity, we consider (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014) (citing *Pearson*, 555 U.S. at 232). Consequently, at summary judgment, an officer may be denied qualified immunity in a Section 1983 action "only if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right, and (2) the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood [his] conduct to be unlawful in that situation." *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

Here, the question of a constitutional violation involves disputed facts which, when viewed most favorably to Ms. Hughes, could support a rational jury finding in her favor. We therefore move to the second question: whether the right at issue was clearly established such that a reasonable officer would have understood his actions were unlawful. The law does not "require a case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate." *al-Kidd*, 563 U.S. at 740. That said, this Court has acknowledged that qualified immunity may be denied in novel circumstances. *See Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011) (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). "Otherwise, officers would escape responsibility for the most egregious

forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." *Deorle*, 272 F.3d at 1286; *see also Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (stating that "in an obvious case, these [*Graham*] standards can 'clearly establish' the answer, even without a body of relevant case law").

The most analogous Ninth Circuit case is *Glenn*, 673 F.3d 864, in which an eighteen-year-old man was shot in his driveway by police officers. Police received a report of an agitated, intoxicated man carrying a pocket knife and threatening to kill himself. Although at least one officer was told that the man had calmed down, when police saw him holding the knife to his own neck they drew their guns and screamed for him to drop it. Additional officers arrived at the scene, one of whom shot the man with several beanbags. The impact of the beanbags caused the man to move away from the beanbag fire and toward the house in which his parents were standing. As police had determined that if the man "made a move toward the house with his parents inside, they would use deadly force," they opened fire and killed him. *Glenn*, 673 F.3d at 869.

Glenn is similar to this case in several respects. For example: it was not clear that the decedent in *Glenn* was actually threatening anyone; no serious crime was being committed; there was no effort to resist or evade arrest aside from failing to put down the knife; the failure to drop the knife may have been the result of confusion by an impaired person; and it might have been reasonable to use less intrusive force. Although the district court had granted summary judgment, this Court remanded *Glenn* for a jury trial. *Id.* at 879–80.

Deorle, 272 F.3d 1272, also offers similar facts, though the plaintiff in *Deorle* was acting far more strangely than Ms. Hughes. In *Deorle*, an officer responded to a call about an individual who was drunk and behaving erratically. At different points, the man brandished a hatchet, shouted "kill me," threatened to "kick [a police officer's] ass," and walked around with an unloaded cross-bow. 272 F.3d at 1276–77. Police observed him for five to ten minutes before the man began walking towards an officer with a bottle of lighter fluid. At that point the officer fired a bean bag, permanently blinding the man and fracturing his skull in several places. *Id.* at 1277–78.

As in this case, police in *Deorle* were at the scene to investigate peculiar behavior. Some sort of mental impairment was evident, the suspect was not trying to escape, and the risk of imminent harm was in question. In denying the officer's qualified immunity defense, this Court wrote:

> Every police officer should know that it is objectively unreasonable to shoot . . . an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals.

Id. at 1285.

Here, several of those same determinations are in dispute, namely: whether Corporal Kisela was reasonable in believing that the kitchen knife was a

weapon; whether he should have suspected mental health issues; whether the warning was sufficient; and most importantly, whether it was reasonable to believe that Ms. Hughes presented a threat to Ms. Chadwick's safety. If those questions are determined in Ms. Hughes's favor, then Corporal Kisela clearly violated her constitutional right.

Corporal Kisela claims support to the contrary from *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005), in which police had received reports of a man in a ski mask carrying a sword through a suburban residential neighborhood. But that case could not reasonably be relied upon as justifying shooting Ms. Hughes. Mr. Blanford was carrying a two-and-a-half-foot-long Civil War-era cavalry saber and made "a loud growling or roaring sound." *Blanford*, 406 F.3d at 1113. He then walked toward a residence and tried to enter after searching his pockets for keys. Unsuccessful, he turned to a walkway, saw the police officers with guns drawn, and heard them order him to drop the sword. The police shot the man as he rounded the far corner of the house, then again as he tried to enter through another door. After the man continued walking, police fired a third time and severed his spine, rendering him a paraplegic. On those facts, the Court found that the officers were entitled to qualified immunity. *Id.* at 1119.

This case, when viewing the facts in Ms. Hughes's favor, differs from *Blanford* in several critical respects. Most importantly, in contrast to a clearly disturbed man carrying a sword, Ms. Hughes held a kitchen knife —which has a perfectly benign primary use— down at her side, and according to Ms. Chadwick's affidavit, did

not appear either angry or menacing. The only information the police had regarding her use of the knife was that she was carving a tree, not that she was threatening or hurting a person. Mr. Blanford plainly disregarded police orders to drop the weapon. Here, it was apparent to Ms. Chadwick, and there is a fact issue whether it should have been evident to the police, that Ms. Hughes did not understand what was happening when they yelled for her to drop the knife. And in *Blanford* the suspect actively evaded police, while Ms. Hughes made no such attempt to get away.

The application of qualified immunity in this case will depend upon the facts as determined by a jury. The facts, viewed in Ms. Hughes's favor, present the police shooting a woman who was committing no crime and holding a kitchen knife. While the woman with the knife may have been acting erratically, was approaching a third party, and did not immediately comply with orders to drop the knife, a rational jury—again accepting the facts in the light most favorable to Ms. Hughes—could find that she had a constitutional right to walk down her driveway holding a knife without being shot. As indicated by *Glenn* and *Deorle*, as well as the Supreme Court's reference to the "obvious case," *Brosseau*, 543 U.S. at 199, that right was clearly established. Based on the disputed facts, Corporal Kisela is not entitled to qualified immunity.

CONCLUSION

We therefore reverse the district court's grant of summary judgment and remand for a jury to determine whether Corporal Kisela's use of deadly force was lawful.

REVERSED AND REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CV 11-366 TUC FRZ

[Filed December 20, 2013]

Amy Hughes, a single woman, Plaintiff, v. Corporal Andrew Kisela, 0203; both individually and in his official capacity, Defendant.	)))))))))

ORDER

I.

Before the Court for consideration is Defendant Kisela's Renewed Motion for Summary Judgment.

This action arises out of an incident which occurred on May 21, 2010, during which Defendant Corporal Andrew Kisela, while on duty and employed by the University of Arizona Police Department ("UAPD"), shot and injured Plaintiff Amy Hughes.

Plaintiff filed the Complaint in this action in state court, alleging two counts of excessive force. Count One alleged negligence; Count Two alleges a violation of

Plaintiff's civil rights. The Court granted Defendant's motion to dismiss Count One alleging the state negligence claim. Count Two alleging excessive force in violation of 42 U.S.C. § 1983 is the sole remaining claim.

Defendant moves for judgment as a matter of law based on the assertion that the force used by the Defendant was an objectively reasonable use of force in light of the totality of circumstances and that Defendant is entitled to qualified immunity because he neither violated a clearly established right under the circumstances presented; nor did he have reason to believe that the use of deadly force was a violation of the Plaintiff's civil rights.

Upon review and consideration of all matters submitted and the parties' arguments presented at the time of hearing, the Court finds that the Defendant is entitled to judgment as a matter of law.

II. FACTS

Defendant Corporal Kisela and UAPD officer-in-training Alex Garcia were in the approximate area of 4th Street and North Park Avenue in Tucson, Arizona, when a call came over the Tucson Police Department ("TPD") Radio reporting a suspicious female hacking at a tree with a knife in the nearby area of 7th Street and Tyndall Avenue.

The officers responded to the call and, within minutes, were flagged down at 7th Street and Euclid by the party who had reported the incident to TPD. The reportee gave the officers a description of the woman that had been observed with the knife and reportedly screaming and acting erratically.

UAPD Officer Lindsay Kunz, who also responded to the call, rode her bicycle and arrived at the scene minutes later joining the Defendant and Officer Garcia.

Officer Garcia almost immediately spotted a female, later identified as Sharon Chadwick ("Chadwick"), in the front yard of a residence at 823 E. 7th Street. The woman was near where her car was parked in the driveway of the residence, which was inside a secured five foot chain link fence with locked gates.

Moments later, the three UAPD officers observed another woman, later identified as Plaintiff Amy Hughes, who matched the description of the woman who was reported to be acting erratically, come out of the front door of the residence carrying a knife in her hand and walking in the direction of the yard where Chadwick was. Both woman were walking toward and in closer proximately to the car.

Officer Kunz reported that Plaintiff appeared aggravated and kept telling Chadwick to "give it to me." It was later determined that Plaintiff was referring to $20 owed to her by Chadwick, and that Chadwick did indeed retrieve $20 from her car and hand the $20 bill to Plaintiff at the time of the incident at issue.

It is undisputed that Plaintiff was moving toward Chadwick and walking around the vicinity of Chadwick, reportedly within an approximate distance of five to eight feet, still holding the 12-inch kitchen knife in her hand. The evidence shows that Plaintiff was close enough to Chadwick to be handed the $20.

All three uniformed officers drew their weapons and Plaintiff was commanded, no less than twice, to drop

the knife. Plaintiff did not acknowledge the uniformed officers' presence and did not respond to their repeated commands to drop the knife.

Plaintiff reportedly had a "thousand mile stare" as described by Officer Garcia and was focused on Chadwick.

As Plaintiff moved closer to Chadwick, and Plaintiff failed to respond to the officers' commands to drop the knife, Defendant fired four shots, striking Plaintiff.

Officer Kunz jumped the fence and handcuffed Plaintiff.

The officers called immediately for medical assistance for the Plaintiff, who sustained non-life threatening injuries from the shooting. Plaintiff was transported to a hospital for treatment.

Following the incident, it was determined that Plaintiff has a history of mental illness.

All events occurred from approximately 5:08 p.m. to 5:17 p.m., during a time period of approximately seven to nine minutes.

Following the shooting, TPD officers investigated and recorded statements from Chadwick, Defendant, Officers Kunz and Garcia. The UAPD Board of Inquiry also interviewed the officers.

The Pima County Attorney's Office, which also investigated the scene of the shooting on the day of the incident, found after reviewing the investigated reports and statements, that the Defendant had acted in defense of a third person, and that based on the circumstances and facts known to the Defendant at the

time, the Defendant's use of force was reasonable and justified.

III. STANDARD OF REVIEW

The principle purpose of summary judgment is to dispose of factually or legally unsupported claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53 (1986). A party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323.

All reasonable inference are drawn in favor of the non-moving party. *Mattos v. Agarano,* 661 F.3d 433, 439 (9th Cir. 2011)(*en banc*)(citing *John v. City of El Monte*, 515 F.3d 936, 941 (9th Cir. 2008)).

Summary judgment is appropriate if the evidence, viewed in the light most favorable to the nonmoving party, shows "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a mater of law." Fed. R. Civ. P. 56(a).

Only disputes over facts that might affect the outcome of the suit will preclude the entry of summary judgment, and the disputed evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. *T.W. Electric Service v. Pacific Electric Contractors*, 809 F.2d 626, 630 (9th Cir. 1987)(citing *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510).

IV. DISCUSSION

Defendant correctly asserts that the question of excessive force may be determined on summary judgment. *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994). Furthermore, when the operative facts are undisputed, qualified immunity is a question of law to be determined by the Court. *Franklin v. Fox*, 312 F.3d 423, 437 (9th Cir. 2002).

Plaintiff also correctly contends that summary judgment can only be granted if, after all factual disputes are resolved in favor of the Plaintiff, the Court concludes that Defendant's use of force was objectively reasonable under the circumstances.

A.

Defendant asserts that, even if the Court were to conclude that the use of force by the Defendant was not objectively reasonable, Defendant is entitled to qualified immunity, which shields governmental officials from liability for civil damages when their conduct does not violate a clearly-established constitutional right that a reasonable person would have known, and permits them to carry out discretionary functions without fear of harassing litigation, which serves the interests of both the public official and society as a whole. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814-818, 102 S.Ct. 2727, 2736-38 (1982); see also *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986).

Defendant submits that, while Plaintiff's injury is unfortunate, the force used by the Defendant was objectively reasonable in light of the totality of circumstances.

Defendant alleges that "[t]he pertinent question in excessive force cases is whether the use of force was 'objectively reasonable in light of the facts and circumstances confronting the [officers], without regard to their underlying intent or motivation," quoting *Graham v. Conner*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1971 (1989). Defendant argues that, whether Chadwick was actually threatened or felt threatened is not a material issue of fact, and thus, Plaintiff's arguments accordingly should be disregarded as irrelevant and inapposite to the qualified immunity analysis.

Defendant, citing Ninth Circuit law adopting the analysis and reasoning of *Graham*, sets forth the factors to be considered by the Court in making a determination regarding the reasonableness of the use of force and the measure of the government interests at stake, which include: (1) the severity of the crime; (2) whether the suspect posed an immediate risk of safety to others; and (3) whether the suspect was actively resisting or evading arrest by flight. See *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (2001); *Smith v. City of Hemet*, 934 689, 702 (9th Cir. 205)(en banc); and *Blanford v. Sacramento County*, 406 F.3d 1110, 1112 (9th Cir. 2005).

Defendant further argues that, while the Ninth Circuit has held that a person's mental instability can be considered as a factor under the *Graham* analysis, Plaintiff's mental illness is not a significant factor in this case, because the fact that Plaintiff is bi-polar was a fact not known to Defendant at the time of the incidence; nor does it alter the analysis.

Even if the Court were to conclude that Defendant's use of force was not objectively reasonable, Defendant

asserts that he is nevertheless entitled to qualified immunity under the two-part analysis of *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 2155 (2001). Defendant sets forth the following two-prong test used to determine whether qualified immunity applies. First, the Court must decide whether the facts show a violation of a constitutional right; if Plaintiff satisfies this first step, the Court must then decide whether the right was "clearly established" and whether it would be clear to a reasonable officer that his conduct was unlawful under the circumstances. *Id.*, 533 U.S. at 200, 121 S.Ct. at 2155; *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 818 (2009).

The first part includes a "clearly-established law" prong. "[A]n officer using deadly force is entitled to qualified immunity, unless the law was clearly established that the use of force violated the Fourth Amendment." *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010).

Defendant asserts that courts have discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first, and argues that, based on the undisputed facts and Ninth Circuit authority, this Court may appropriately find that Defendant did not violate Plaintiff's constitutional rights and find that Plaintiff fails to satisfy the first prong of the *Saucier* analysis. See *Pearson*, 555 U.S. at 236, 129 S.Ct. at 818,

Citing *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991), Defendant further argues that he is entitled to qualified immunity under the second prong of the qualified-immunity analysis, which considers whether the *particularized* right asserted by a plaintiff

was "clearly established." *Saucier*, 533 U.S. at 200, 121 S.Ct. at 2155. Defendant asserts that this prong is not satisfied if, at the time the force was used, the law was not sufficiently clear that *every* reasonable official would have understood that what he was doing violated a constitutional right. See *Mattos*, 661 F.3d at 446.

Defendant concludes that the Plaintiff enjoyed no constitutional right to appear to threaten another with a deadly weapon without experiencing abrupt and forceful intervention by law enforcement, and that the Ninth Circuit precedent set forth in *Blanford* and *Sheenan v. City and County of San Francisco,* 2011 WL 1748419 (N.D.Cal.), establishes that a reasonable officer, in the situation Defendant was confronted with, could have determined that it was appropriate and lawful to use deadly force to protect Chadwick. Defendant further argues that the relevant case law establishes that, where a mentally ill person appeared to present an imminent risk of serious injury or death, the use of deadly force was held to be objectively reasonable; therefore a finding of qualified immunity as a matter of law is appropriate.

Defendant refers to his previous argument and analysis under *Graham*, and argues that Plaintiff cannot show a clearly established constitutional right to behave as she did without being subject to forceful intervention by law enforcement, and that under the Fourth Amendment, officers may use such force as is objectively reasonable under the circumstances. 490 U.S. at 397, 109 S.Ct. at 1865.

Defendant asserts that the material facts are admitted or beyond dispute. Plaintiff was holding a knife and did not respond to the uniformed officers'

commands to drop it. Furthermore, Plaintiff was actively moving and approaching Chadwick, and in close enough proximity to have injured Chadwick with the knife. Based on the reasoning and authority presented, Defendant argues that the Court may find that Defendant did not violate Plaintiff's constitutional rights; therefore Plaintiff fails to satisfy the first prong of the *Saucier* analysis.

Defendant relies on *Mattos* and *Blanford* as relevant precedent, arguing specifically that *Blanford* precludes Plaintiff from arguing that she had a "clearly established" right to act as she did without being subject to the use of deadly force, and prevents Plaintiff from establishing that every reasonable official would have understood that what he was doing violated a constitutional right.

Defendant argues, quoting *Anderson v. Creighton*, that to conclude that the right alleged to be violated is "clearly established," "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U.S. 635, 639, 107 S.Ct. 3034, 3038 (1987).

Defendant concludes that the Court should grant summary judgment in favor of Defendant based on a finding that the use of force under the circumstances established by the undisputed facts was objectively reasonable and appropriate.

B.

Plaintiff does not oppose Defendant's legal analysis, but does dispute the applicability of the law to the facts of this case. Plaintiff's opposition is based on her assertion that the officers did not have a reasonable

belief that she was committing an assault with a deadly weapon and argues that the fundamental factual dispute in this case which prevents granting summary judgment is whether the Plaintiff threatened Chadwick, and whether a reasonable "officer would have perceived a significant and immediate threat" to Chadwick before the Defendant shot the Plaintiff. Plaintiff reasons that, because Defendant used deadly force, his actions would be objectively reasonable only if he perceived a significant and serious threat to Chadwick.

Plaintiff argues that, if all factual disputes are resolved in favor of Plaintiff, Defendant was not entitled to qualified immunity when he shot the Plaintiff, because she was acting peaceably and did not threaten anyone. Plaintiff admits that "a police officer is justified in using deadly force to prevent a suspect from attacking a victim with a butcher knife," but disputes that the Defendant was justified in using deadly force to prevent the Plaintiff from attacking Chadwick with a kitchen knife. Plaintiff distinguishes the facts in this case from the facts of *Sheenan* and *Blanford*, in which she argues, unlike the present facts, there was an imminent and obvious risk involved.

Plaintiff argues that, despite the fact that neither Officer Garcia nor Officer Kunz observed the Plaintiff display any aggressive or threatening behavior towards Chadwick, Defendant's expert, unjustifiably jumps to the conclusion that it is "highly probable that the [Defendant's] actions prevented ... Chadwick from being killed or seriously injured." Plaintiff further argues that the expert's opinion ignores the fact that neither Officer Garcia nor Officer Kunz observed any

threatening behavior on the part of the Plaintiff; therefore the expert witness' opinion is not valid.

Plaintiff argues that, without more, the fact that a woman is walking towards another woman with a knife in her hand does not make it highly probable that she is going to stab the other woman; nor does the fact that the woman does not drop the knife in her hand within a few seconds after commands to do so change that probability.

In distinguishing the cases cited by Defendant, Plaintiff concludes that, without observing some threatening behavior on the part of the Plaintiff, Defendant's use of deadly force was not objectively reasonably, and all factual disputes resolved in favor of the Plaintiff do not entitle Defendant to qualified immunity.

IV. ANALYSIS

A. Excessive Force

Under Ninth Circuit law, all claims of excessive force, whether deadly or not, in general, are analyzed under the objective reasonableness standard of the Fourth Amendment as applied in *Graham v* and *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769 (2007). In *Acosta v. Hill*, 504 F.3d 1323 (9th Cir. 2007), the Ninth Circuit described the Supreme Court's holding *in Scott v. Harris* as follows: [T]here is no special Fourth Amendment standard for unconstitutional deadly force. *See id.* Instead, 'all that matters is whether [the police officer's] actions were *reasonable.*' (emphasis added)." (internal citations omitted).

In *Blanford*, the reasonableness standard under *Graham* was described as follows:

> "Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396. . . . . This balancing test entails consideration of the totality of the facts and circumstances in the particular case, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

Blanford, 406 F.3d at 1115.

"These factors, however are simply a means by which to determine objectively 'the amount of force that is necessary in a particular situation.'" *Deorle*, 272 F.3d at 1280 (quoting *Graham*, 490 U.S. at 396-97, 109 S.Ct. 1865).

Moreover, in *Jackson v. City of Bremerton*, the Ninth Circuit held that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, *rather than with the 20/20 vision of hindsight*." 268 F.3d 646, 651 (9th Cir.2001)(quoting *Graham*, 490 U.S. at 396, 109 S.Ct at 1872)(internal citation omitted)(emphasis added). The court noted the "consideration of reasonableness must embody allowance for the fact

that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Id.* (citations omitted).

Moreover, [i]n evaluating the nature and quality of the intrusion, [a court] must consider 'the type and amount of force inflicted'" in making an arrest. *Id.* at 651-52 (quoting *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir.1994)).

As noted by the Ninth Circuit, the Supreme Court did not limit the reasonableness inquiry to the factors set forth in *Graham*:

> Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," the reasonableness of a seizure must instead be assessed by carefully considering the objective facts and circumstances that confronted the arresting officers. In some cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider.

Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir 2005)(citations omitted).

Furthermore, if "it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed." *Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir.2003).

Under the analysis of *Graham*, even considering Plaintiff's emotional state, it does not appear that the force used by Defendant was objectively unreasonable "in light of *all* the relevant circumstances." *Smith*, 394 F.3d at 701 (citation omitted).

Accordingly, the evidence presented does not raise a genuine issue of material fact or support a finding of excessive force. The Court finds Defendant entitled to judgment as a matter of law.

II. Qualified Immunity

Based on the Court's finding that the force used by the Defendant was objectively reasonable, the Court need not reach the issue of qualified immunity. Briefly, the Ninth Circuit reiterated the two-step analysis in *Ramirez v. City of Buena Park,* as follows:

> Under *Saucier*'s first prong, we consider whether, "[t]aken in the light most favorable to the party asserting the injury, ... the facts alleged show the officer's conduct violated a constitutional right." *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151. Where disputed issues of fact remain, we view the facts in the light most favorable to [...] the non-moving party. *See Beier v. City of Lewiston,* 354 F.3d 1058, 1063 (9th Cir.2004). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier*, 533 U.S. at 201.
>
> Under *Saucier*'s second prong, we ask "whether the right was clearly established." *Id.* To be "clearly established," the " 'contours of the right

> must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Id.* at 202, 121 S.Ct. 2151 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). The dispositive inquiry is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* "If the officer's mistake as to what the law requires is reasonable, ... the officer is entitled to the immunity defense." *Id.* at 205.

560 F.3d 1012, 1020 (9th Cir. 2009).

Again, under the totality of the circumstances and the standard of "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," it appears that Defendant's conduct was reasonable; Defendant would therefore be entitled to qualified immunity.

Based on the foregoing,

IT IS ORDERED that Defendant Kisela's Renewed Motion for Summary Judgment (Doc. 32) is GRANTED;

Judgment shall be entered in favor of Defendant accordingly.

DATED this 18th day of December, 2013.

s/_____

Frank R. Zapata
Senior United States District Judge

APPENDIX D

U.S. Const. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

RECORD AND BRIEFS

No. 17-467

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IN THE

Supreme Court of the United States

ANDREW KISELA,

Petitioner,

v.

AMY HUGHES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Corporal Kisela is entitled to summary judgment on qualified immunity grounds for shooting Amy Hughes when the facts, viewed in the light most favorable to Hughes, are these: At the moment Kisela shot Hughes, she was standing stationary in her yard, five to six feet away from Sharon Chadwick. The two women were conversing, and Hughes appeared calm and peaceable. A kitchen knife, pointed down to the ground, rested in her hand. The police told Hughes to drop the kitchen knife twice, but she appeared not to register the instruction. Chadwick asked the police and Hughes to "take it easy." Kisela opened fire on Hughes, shooting at her four times through a metal fence.

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STATEMENT OF THE CASE

I. Facts

Amy Hughes and Sharon Chadwick lived in the same house, and the two women were good friends. ER 107 (Chadwick). On May 21, 2010, Ms. Hughes had been seen cutting a tree with a knife, and police were radioed to check on her welfare. ER 286 (Kisela), 321 (Kunz). No crime had been reported. ER 114 (Garcia).

Corporal Andrew Kisela arrived on the scene with Officer Alex Garcia. ER 301 (Garcia). Officer Lindsey Kunz arrived separately. ER. 302 (Garcia). The officers first saw Ms. Chadwick. ER 301–302 (Garcia). Hughes came out of her house and into the yard, walking in Chadwick's direction. ER 301–302 (Garcia). Less than a minute later, Hughes was bleeding on the ground, having been shot by Corporal Kisela. ER 286–287 (Kisela). Virtually everything that happened between the arrival of the police and the shooting of Ms. Hughes is disputed. Viewed in the light most favorable to Ms. Hughes, the facts are these:

The police observed Hughes and Chadwick having a discussion and talking back and forth. ER 322–323 (Kunz). Hughes's demeanor during the discussion was composed and content. ER 109 (Chadwick). Hughes was acting peaceably. ER 194–195 (Hughes Resp. to Requests for Admission). She did not appear angry. ER 323 (Kunz). Because Hughes was holding a kitchen knife at her side, the officers drew their guns. ER 302–303 (Garcia). Kisela drew first. ER 303 (Garcia). The officers did not observe Hughes make any threatening

moves, or threaten Chadwick in any way. ER 110–111 (Chadwick); ER 246 (Hughes); ER 325 (Kunz).

Although the police officers were in uniform, they did not identify themselves as police. ER 110 (Chadwick); ER 304 (Garcia). They instructed Hughes to drop the kitchen knife twice. ER 109 (Chadwick). Hughes appeared not to hear the two instructions. ER 323–324 (Kunz). To prevent her friend from being shot, Chadwick said, "hey, take it easy," directing the comment to both Hughes and the police. ER 109, 199 (Chadwick).

At the time Kisela shot Hughes, Hughes and Chadwick were approximately five to six feet apart, and both were stationary. ER 281 (Kisela); ER 306 (Garcia). Hughes, who was standing in her own yard, held a kitchen knife in her left hand. Her arm was resting down at her side, and the tip of the kitchen knife pointed toward the ground. ER 109–110 (Chadwick); ER 305–306 (Garcia). She did not raise the kitchen knife at any point that the police were present. ER 110 (Chadwick); ER 322, 325 (Kunz); ER 306 (Garcia).

The other two officers did not shoot. ER 118 (Garcia); ER 325 (Kunz). Officer Garcia held his fire because he "wanted to continue trying verbal command and see if that would work." ER 120 (Garcia). He was inclined to "use some lesser means" than shooting Hughes because there was time "[t]o try to talk her down." ER 120–121.

After she was shot, Hughes fell to the ground, bleeding and screaming. ER 109 (Chadwick); ER 286

(Kisela). She looked up at the officers and said, "Why'd you shoot me?" ER 308 (Garcia).

When he shot at Hughes four times, Corporal Kisela endangered not only her but also his fellow officers and Ms. Chadwick because he fired through a metal chain link fence. According to Hughes' expert, "[t]he force of the round at approximately 1000 ft a second could have fragmented and hit not only the person it was intended for but anyone within close proximity . . . ." ER 155. Chadwick herself was hit by a projectile during the shooting. ER 211 (Chadwick).

II. Proceedings

Ms. Hughes brought suit against Corporal Kisela in the United States District Court for the District of Arizona, alleging a claim under 42 U.S.C. § 1983 for excessive force under the Fourth Amendment and a state law claim for negligence. Pet. App. 70–71. The district court granted Kisela's motion to dismiss the state law negligence claim, and later granted his motion for summary judgment on the excessive force claim, finding that Kisela did not violate the Fourth Amendment and was entitled to qualified immunity. Pet. App. 71, 84–85.

Hughes appealed, and the court of appeals reversed the grant of summary judgment on the excessive force claim, finding that summary judgment was improper on the issue of excessive force because "[m]aterial questions of fact, such as the severity of the threat, the adequacy of police warnings, and the potential for less intrusive means are plainly in dispute." Pet. App. 43, 49. The court also concluded

that "the record does not support Corporal Kisela's perception of an immediate threat." Pet. App. 38. Because a rational juror could find that no immediate threat existed, and because previous Ninth Circuit cases found a Fourth Amendment violation where police used deadly force against people who did not present any immediate threat, the court held that Corporal Kisela was not entitled to summary judgment on qualified immunity grounds. Pet. App. 44–49. The court concluded that a jury "could find that [Hughes] had a constitutional right to walk down her driveway holding a knife without being shot." Pet. App. 49.

Kisela filed a petition for rehearing en banc, which the court of appeals denied. Pet. App. 2. Judge Ikuta, joined by Judges Kozinski, Tallman, Bybee, Callahan, Bea, and N.R. Smith, dissented from the denial of rehearing en banc. Pet. App. 17. The dissent argued that the panel opinion framed clearly established law at too high a level of generality. Pet. App. 17. According to the dissent, the panel should have considered whether "shooting a reportedly erratic, knife wielding woman who comes within striking distance of a third party, ignores multiple orders to drop her weapon, and cannot otherwise be timely subdued due to a physical barrier separating her from the officer" violated clearly established law. Pet. App. 23. Judge Berzon, joined by Judge Gould, filed a concurrence in the denial of rehearing en banc. Pet. App. 5. Judge Sessions, who sat by designation on the panel, agreed with the views stated in the concurrence. Pet. App. 4.

REASONS FOR DENYING THE PETITION

This fact-bound case comprises a tangled and inconsistent set of disputed recollections. The proper outcome turns on which conflicting parts of which conflicting witness accounts a factfinder ultimately decides to credit. This case is a poor candidate for certiorari or summary reversal because the record fails to answer definitively nearly all of the important factual questions that this case presents. For the same reason, it is a poor vehicle to resolve any legal question of broad significance.

The petition and the dissent from denial of rehearing oversimplify the facts of this case, relying on assumptions contradicted by other accounts contained in the record, and failing to present the facts in the light most favorable to Ms. Hughes. Contrary to the petition, a rational juror could find the following facts: (1) Hughes appeared calm and peaceable when Corporal Kisela shot her, (2) the police did not observe Hughes do anything threatening, (3) the police warned Hughes to drop her kitchen knife only twice, (4) Corporal Kisela would have known based on Hughes' demeanor that she did not register either warning, (5) Chadwick told the police to "take it easy" to prevent them from needlessly shooting Hughes, (6) Hughes was standing stationary when Corporal Kisela shot her, (7) Hughes' kitchen knife was resting in her hand and pointed down to the ground, (8) Kisela fabricated a skin-saving story—contradicted by every other witness—that Hughes raised the kitchen knife just before he shot her, (9) Officer Garcia held his fire because he wanted to deescalate the situation with

verbal instructions to Hughes, (10) Corporal Kisela recklessly exposed not only Hughes but also his fellow officers and Ms. Chadwick to danger by firing four times into a metal fence.

Taking these as the facts, as the Court must at this stage of the proceedings, this is not a complicated case from the standpoint of qualified immunity. It is well settled that a police officer may shoot a person only "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

In this case, Corporal Kisela committed an obvious constitutional violation by shooting a woman who was conversing in a peaceable manner while holding a kitchen knife in a residential yard (her own yard, as it turned out). Many cases from the Ninth Circuit and other courts of appeals stand for the obvious proposition that police cannot shoot at someone merely because she has a weapon—there must, at minimum, be some indication that she is going to use it. *See Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997); *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001); *Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991); *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995); *McKinney v. DeKalb Cty.*, 997 F.2d 1440 (11th Cir. 1993); *Reyes v. Bridgwater*, 362 Fed. Appx. 403 (5th Cir. 2010); *Duong v. Telford Borough*, 186 F. App'x 214 (3d Cir. 2006); *Mercado v. City of Orlando*, 407 F.3d 1152 (11th Cir. 2005).

This case also does not present a circuit split, or a conflict with the prior decisions of this Court or the

Ninth Circuit. The supposed split rests on the incorrect premise that the decision below failed to consider third-party harm, but the court of appeals clearly analyzed the possibility of such harm. The court of appeals simply took the facts in the light most favorable to Hughes, as the law requires on summary judgment. On those facts, Corporal Kisela was not entitled to summary judgment because he sprayed a woman with bullets for no good reason.

I. This Case is a Poor Candidate for Certiorari or Summary Reversal Because the Facts Are Muddled by Various Conflicting Accounts, and the Petition Does Not Present the Facts in the Light Most Favorable to Hughes.

A. The Record Contains Contradictory Evidence on Virtually Every Important Fact.

When the record is considered in the light most favorable to Ms. Hughes, the factual predicates of the petitioner's questions presented disappear. Police did not observe Hughes "acting erratically," but displaying a calm and content demeanor. Pet. i. Although the officers did observe Hughes "walking . . . toward" Chadwick, *id.*, Hughes had stopped and was standing still when Kisela opened fire. Hughes did not simply "move[ ] with" Chadwick, *id.*—she moved away from Chadwick at other points. Hughes did not "ignore[ ] commands to drop the knife, *id.*, but did not hear or did not register them, as Kisela would have realized. Kisela did not have a "well-founded belief that potentially lethal force was necessary to protect

[Chadwick] from an attack that could have serious or deadly consequences," *id.*, because the facts did not establish any immediate threat. In fact, as we demonstrate below, not only the factual assertions in the questions presented, but virtually all of the key factual premises relied upon by the petitioner and the dissent do not construe the record in the light most favorable to Hughes.

1. Did Hughes appear agitated, or calm and peaceable?

In an effort to paint Hughes as unhinged during her interaction with the police, petitioner cites testimony from a witness who observed Hughes earlier in the day, but was not present for Hughes' and Chadwick's encounter with the police. Pet. 3. The characterizations of this witness do not shed light on Ms. Hughes' demeanor at the relevant time—when police observed her. At the time the officers arrived on the scene, they were responding to a radioed in call to check on the welfare of a woman who had been seen cutting tree branches with a knife. ER 286 (Kisela), 321 (Kunz).

Viewed in the light most favorable to the respondent, the police observed a Ms. Hughes who appeared placid and harmless. Chadwick described Hughes as "composed and content" throughout their discussion outside the house. Pet. App. 11; ER 109 (Chadwick). Hughes denied that she was doing anything other than "acting peaceably" during the conversation. ER 194–195. It appeared to Officer Kunz that Hughes was "talking back and forth with [Chadwick]," and "[i]t was kind of like she was having

a discussion with [Chadwick]." ER 322, 323 (Kunz). During the discussion that the two women were having, Hughes "wasn't shouting" and "it didn't seem like she was angry." ER 323 (Kunz); Pet. App. 11. Thus, as the panel concluded, "the facts seen in the light most favorable to Hughes make clear that she did *not* act erratically once officers arrived." Pet. App. 14.

Petitioner misunderstands these characterizations as reflecting only Chadwick's "subjective" lack of fear, based on her friendship with Hughes. Pet. 20. In fact, as the panel stated, Chadwick's statements are descriptions of "Ms. Hughes's demeanor." Pet. App. 34. Fact witnesses are fully competent to testify to the demeanor of a person they observed. *See United States v. Meling*, 47 F.3d 1546, 1556 (9th Cir. 1995). A rational juror might credit Kisela's descriptions of Hughes as agitated. A rational juror might also conclude that Kisela described Hughes as agitated because he shot her and needed to justify it.

2. Did Hughes threaten Chadwick?

The petitioner seeks to depict Ms. Hughes as threatening Chadwick during the interaction witnessed by the officers. Pet. 2. Neither Officer Kunz nor Officer Garcia saw Hughes making threats to either the officers or to Chadwick. ER 324 (Kunz); ER 306 (Garcia). Officer Kunz did not observe Hughes making "any quick movements," and characterized the interaction between Hughes and Chadwick as simply "a discussion." ER 323 (Kunz). Viewing the facts in the light most favorable to Hughes, she did not threaten Chadwick or anyone else. During the incident, Chadwick "was never in fear, and did not feel that Ms.

Hughes was a threat." Pet. App. 35; ER 110–111 (Chadwick). Hughes stated that she was "no threat to nobody." ER 246 (Hughes).

3. How many times did the police instruct Hughes to drop the kitchen knife?

Chadwick, Kisela, Garcia, and Kunz offer differing accounts of how many times the officers told Hughes to drop the kitchen knife. ER 109 (Chadwick); ER 281, 283 (Kisela); ER 304 (Garcia); ER 322 (Kunz). The favorable account for Hughes, and therefore the governing account for purposes of summary judgment, is Chadwick's. Chadwick heard only two warnings "in quick succession." Pet. App. 35, 60; ER 109 (Chadwick).

4. Did the officers reasonably believe that Hughes heard their instructions to drop the kitchen knife?

The petitioner states several times that Hughes "ignored" instructions from police to drop the kitchen knife. Pet. i, 4, 5, 18. This characterization suggests that she heard the instructions and willfully ignored them, but it does not construe the facts in the light most favorable to Hughes. A rational juror could draw the more favorable inference that Hughes simply did not hear the instructions, and that reasonable officers would have perceived that she did not hear them. *See* Pet. App. 49. Indeed, Officer Kunz stated, "it seemed as though she didn't even know we were there" and "[i]t was like she didn't hear us almost." ER 323–324 (Kunz). Similarly, Officer Garcia stated that Hughes acted "almost as if we weren't there." ER 304 (Garcia).

Garcia tried to get Hughes' attention by shaking the fence. ER 304 (Garcia). Though clad in uniforms, the officers did not identify themselves as police officers. Pet. App. 15; ER 304 (Garcia), ER 330 (Kunz). As the panel stated, "[w]hether police should have perceived" that Hughes did not understand the two instructions "is a question for the jury." Pet. App. 41.

5. What did Chadwick say to the officers who were pointing their guns at Hughes?

The petition creates a false impression that Chadwick did nothing to warn the police officers that shooting Hughes was unnecessary. Pet. 5–6 ("Chadwick was aware of the officers with their drawn guns. But she did not express the view that she later asserted: that she did not feel threatened by Hughes."). In fact, Chadwick did not have time to say much because Kisela shot Hughes less than a minute from when she came into view. Pet. App. 35; ER 286–287 (Kisela). Yet even in that narrow sliver of time, while the police pointed their guns at Hughes, Chadwick said "hey, take it easy." ER 109 (Chadwick). She directed the comment to both the police and Ms. Hughes. ER 199 (Chadwick). Chadwick was about to add, "everything is all right," but she was unable to do so because Kisela opened fire. ER 109 (Chadwick).

6. When Kisela shot Hughes, how far apart were Hughes and Chadwick?

Witnesses presented differing recollections of the distance separating Hughes and Chadwick. ER 281 (Kisela), ER 305 (Garcia), ER 330 (Kunz), ER 207 (Chadwick). The most favorable account in this regard

is that the two stood about five to six feet apart. ER 281 (Kisela).

7. When Kisela shot Hughes, was Hughes approaching Chadwick or standing still?

Although Hughes had walked toward Chadwick, there are differing accounts of whether Hughes was approaching Chadwick at the moment when Kisela fired, or standing stationary. Kisela claims Hughes was "[w]alking straight towards [Chadwick]" and "[c]oming right at her" when he fired. ER 282, 284 (Kisela). Garcia, however, stated that Hughes was standing stationary, having "stopped there in front of the woman." ER 306 (Garcia). In a summary judgment posture, the Court must assume the truth of Officer Garcia's account because it is more favorable to Ms. Hughes.

The petition twice states that Hughes "moved with" Chadwick, conjuring up an image of Hughes following Chadwick around the yard. Pet. i, 18. In fact, during the brief period that officers observed the two, they also observed Hughes moving *away* from Chadwick. Pet. App. 11; ER 281 (Kisela), ER 330 (Kunz).

8. Did Hughes "wield" the kitchen knife at any point?

The petitioner characterizes Ms. Hughes as "wielding" her kitchen knife during the encounter. Pet. 1–2. This is an incorrect characterization of Hughes' actions because the word "wield" incorrectly suggests that Hughes "had [the kitchen knife] in position for use as a weapon." Pet. App. 15, n.3. On the facts most

favorable to Hughes, she was merely "carrying a kitchen knife." *Id.*

9. When Kisela shot Hughes, where was the kitchen knife?

According to petitioner, "Kisela stated that he saw Hughes raise the knife." Pet. 5. Kisela indeed made that claim, ER 281–282, but everyone else present contradicted it. According to Chadwick, the kitchen knife was "in [Hughes'] left hand down at her side." ER 109 (Chadwick). *See also* ER 110 (Chadwick) ("At no time before Amy was shot that day did Amy ever even raise the knife which was in her left hand."); *id.* ("When the officer shot Amy she was just holding the knife in her left hand with her arm down by her side, and the knife blade was pointed to the rear of her body."); ER 209 (Chadwick) (Hughes was holding the kitchen knife with the tip pointed down). According to Officer Kunz, Hughes "was just holding it down next to her side in her left hand . . ." ER 322 (Kunz). Kunz "didn't see her arm raise." ER 325 (Kunz). Officer Garcia likewise stated that Hughes did not raise the kitchen knife. Pet. 19; ER 306 (Garcia). In light of these accounts, a rational juror could draw the inference that Kisela lied about his perception that Hughes raised the kitchen knife in order to save his own skin.

B. The Petition Omits Important Facts that a Rational Juror Could Find.

In addition to resolving disputed facts in Kisela's favor, the petition and dissent omit facts favorable to Hughes. First, it is undisputed that the other officers

chose not to fire, although they observed the same situation. ER 118 (Garcia); ER 325 (Kunz). Officer Garcia candidly stated that he "wanted to continue trying verbal command and see if that would work." ER 120 (Garcia). In Officer Garcia's judgment, there was time "[t]o try to talk her down" and to "use some lesser means." ER 120–121 (Garcia). A rational juror could find that the judgment of the other officers in holding their fire is relevant to whether Corporal Kisela's use of force was reasonable.

A rational juror could also conclude that Kisela endangered third parties by shooting at Hughes. "The force of the round at approximately 1000 [feet] a second could have fragmented and hit not only the person it was intended for but anyone within close proximity . . ." ER 155. Chadwick herself was hit by a projectile, and the officers were standing close to each other when Kisela fired. ER 211 (Chadwick); ER 307 (Garcia).

Given the conflicting evidence on nearly all the material facts, this case does not lend itself to summary disposition. This case is also too fact-bound to provide a vehicle for resolving any recurrent legal questions through a grant of certiorari.

C. The Dissent from Denial of Rehearing En Banc Misstates the Facts.

The dissent states, "[t]he relevant facts necessary to resolve the qualified immunity analysis are not in dispute," Pet. App. 18, but goes on to characterize disputed facts in a manner unfavorable to Ms. Hughes and to ignore facts favorable to her. The dissent's legal

analysis flows from its incorrect presentation of the facts, and therefore loses its force when the facts are construed in the manner most favorable to Hughes.

Contrary to the dissent's assertion that Hughes "failed to comply" with two instructions to drop the knife, Pet. App. 19, a juror could conclude that a reasonable officer would have realized that Hughes did not hear or did not process the instructions. *See supra* § I.A.4. The dissent claims that Ms. Hughes "continued to approach Chadwick" at the moment Corporal Kisela fired, Pet. App. 19, but Officer Garcia stated that Ms. Hughes "stopped there in front of the woman." ER 306 (Garcia). The dissent ignores the fact that Ms. Chadwick asked the officers to "take it easy," ER 109, and the account that Ms. Hughes appeared composed and content. ER 109 (Chadwick).

The dissent again misstates the record and resolves disputed facts when it suggests that the "alleged constitutional violation" the panel should have considered in the qualified immunity analysis was "shooting a reportedly erratic, knife-wielding woman who comes within striking distance of the third-party, ignores multiple orders to drop her weapon, and cannot otherwise be timely subdued due to a physical barrier separating her from the officer." Pet. App. 23. Viewing the facts in the light most favorable to Hughes, she was not "wielding" anything, but was simply holding a kitchen knife as she relaxed her arm at her side, had not heard or processed two (not "multiple") instructions to drop the kitchen knife, and did not appear "erratic." *See supra* § I.A. Although the earlier third-hand account on the officers' radio

might have described Ms. Hughes as "erratic," she appeared calm when they arrived on the scene. ER 109 (Chadwick).

These factual characterizations undermine the dissent's legal analysis. The dissent distinguishes *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), on the ground that the instant case involves "[s]hooting an armed, unresponsive, and reportedly erratic woman as she approaches a third party," Pet. App. 26, but fails to acknowledge Officer Garcia's account that Ms. Hughes had stopped and was not approaching anyone when Corporal Kisela shot her. ER 306 (Garcia). The characterization of Ms. Hughes as "reportedly erratic," Pet. App. 26, also ignores the accounts that suggest she would have appeared calm and peaceable to officers on the scene, undercutting third-hand reports of earlier erratic behavior.

Similarly, the dissent's analysis of *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005), *cited in* Pet. App. 28, a shooting case in which the Ninth Circuit did not find a constitutional violation, depends on dramatizing the facts of this case and sanitizing the facts of *Blanford*. Here again, the dissent states that Ms. Hughes "refused to drop her weapon," Pet. App. 28, even though a reasonable juror could find that the officers should have known that Hughes did not hear or process the instructions. The dissent states that Hughes was "attempting to put herself in a situation where she could have caused harm," Pet. App. 28, ignoring Officer Garcia's account that Hughes had stopped approaching Chadwick and was standing still.

The sword-wielder in *Blanford* is so dissimilar from Ms. Hughes as to render the case totally irrelevant. In *Blanford*, officers responded to reports of a man carrying a sword through a residential neighborhood while clad in a ski mask, licking the sword, and walking down the middle of a street. 272 F.3d at 1112. They arrived to find a man brandishing a 2-1/2 foot sword and wearing a ski mask pulled up from his face. *Id.* 1112. They repeatedly told him to drop the sword, identified themselves as police, and said that they would shoot. *Id.* 1112–13. But he kept going. *Id.* He raised the sword to the air and emitted a loud growl. *Id.* at 1113. The man saw the deputies and realized they "might be there for him." *Id.* Then he tried to enter a home through the back entrance while wielding the sword. *Id.* The officers opened fired because they reasonably feared that if he got into the house, he could harm anyone inside it with the sword. *Id.* at 1113.

II. Viewing the Facts in the Light Most Favorable to Hughes, Corporal Kisela is Not Entitled to Qualified Immunity.

A. Viewing the Facts in the Light Most Favorable to Hughes, Corporal Kisela Committed an Obvious Constitutional Violation.

If the facts are viewed in the light most favorable to Hughes, Kisela committed an obvious constitutional violation because he lacked any justification for the use of deadly force. Hughes displayed a calm demeanor and was speaking with her friend in their shared yard. *See supra* § I.A.1. Hughes had walked up

to Chadwick, had stopped five to six feet from her, and was standing still. *See supra* § I.A.6. As the two women conversed, Hughes rested her arm at her side, holding a kitchen knife that pointed down toward the ground. *See supra* § I.A.9. The officers gave two instructions to drop the knife, but Hughes did not seem to have heard either one. *See supra* § I.A.3. After police drew their weapons, Chadwick told Kisela and the others present to "take it easy." *See supra* § I.A.5. But rather than taking it easy, Kisela shot Hughes four times through a chain-link fence, causing her serious injury and creating a needless risk of injuring Chadwick, Garcia, and Kunz with flying shrapnel. *See supra* § I.A.5.

Kisela disputes all of these facts, of course, but that only serves to illustrate that the complicated part of this case is the facts—the conflicting accounts make the facts far from obvious, which is why a jury should sort them out. On summary judgment, however, when the complicated and conflicting narratives of the shooting must be stripped down to the account most favorable to respondent, this case becomes obvious as a legal matter. There was no reason for Kisela to shoot Ms. Hughes.

Although the legal standards that this Court announced in *Graham v. Connor*, 490 U.S. 386 (1985), and *Tennessee v. Garner*, 471 U.S. 1 (1985), are not particularized enough to defeat qualified immunity in non-obvious cases, they do clearly establish law sufficient to dispose of obvious cases like this one. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) ("Of course, in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant

case law."); *see also White v. Pauly*, 137 S. Ct. 548, 552 (2017) ("*Garner* and *Graham* do not by themselves create clearly established law outside 'an obvious case.'" (citing *Brosseau*, 543 U.S. at 199)).

B. Kisela Is Not Entitled to Qualified Immunity Because Both Ninth Circuit Law and the Law of Other Circuits Clearly Establish that Police Cannot Shoot a Person Merely for Being Armed if She Does Not Make Any Threatening Moves.

Ninth Circuit decisions that predate the events at issue in this case clearly establish that police officers cannot shoot a person—such as a woman conversing in her yard and holding a kitchen knife—if she does not pose an immediate risk of harm to an officer or third party, even if the person is holding a weapon. These cases reflect the Ninth Circuit's refinement of the basic principle that "[a]n officer's use of deadly force is reasonable only if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) (quoting *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)); *Chew v. Gates*, 27 F.3d 1432, 1452 (9th Cir. 1994) (same); *Long v. City and County of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007) (same).

The Ninth Circuit has repeatedly applied the rule that police cannot shoot a person merely for being armed—the person must *do something* such as make a threat or point the weapon at someone. *Harris v. Roderick*, 126 F.3d 1189, 1193–94 (9th Cir. 1997), involved the shooting of Kevin Harris at Ruby Ridge.

On the previous day, Harris had been involved in a firefight with other FBI agents, one of whom died, possibly from a bullet fired by Harris. *Id.* at 1193. The next day, an FBI agent shot Harris, who was armed with a gun and running into a cabin. *Id.* at 1194. Harris did not make any threatening movement with the gun, and the case clearly establishes the proposition that "[l]aw enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed." *Id.* at 1204.

Similarly, in *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), a suspect acted erratically outside his home and "brandish[ed] a hatchet at a police officer." *Id.* at 1276. After discarding the hatchet, the suspect approached another officer while carrying an unloaded crossbow, which he dropped when ordered to do so. *Id.* at 1277. But the suspect continued to hold what may have been a can or bottle of lighter fluid as he approached the officer. *Id.* The officer shot the suspect with a bean-bag round. *Id.* at 1277–78. The court found that the officer committed a constitutional violation and was not entitled to qualified immunity. *Id.* at 1285–86.

Ninth Circuit law clearly establishes that police who shoot a suspect holding a *semi-automatic rifle* are not entitled to qualified immunity if there are conflicting accounts of whether the suspect raised the weapon or threatened anyone with it. In *Curnow v. Ridgecrest Police*, 952 F.2d 321, 323 (9th Cir. 1991), Officer A attempted to break down the door to the home of a suspect who had a semiautomatic rifle

within arm's reach, while Officer B aimed his gun at the suspect through a window. Ultimately, Officer B shot the suspect through the window. *Id.* Witnesses in *Curnow* disputed whether the suspect raised the rifle when Officer A tried to knock down the door or merely grabbed the rifle by the muzzle. *Id.* Viewing the facts in the light most favorable to the shooting victim, the court of appeals affirmed the denial of summary judgment to Officer B: There was no immediate danger when Officer B shot the suspect because the suspect had merely taken the semiautomatic rifle by the muzzle without aiming it at anyone. *Id.* at 325.

Surely the rule that police cannot shoot a suspect merely for holding a firearm also applies to a kitchen knife, which is generally less dangerous. *See Walker v. City of Orem*, 451 F.3d 1139, 1160 (10th Cir. 2006) ("[W]here an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him . . . it was unreasonable for the officer to use deadly force against the suspect."); *Bouggess v. Mattingly*, 482 F.3d 886, 896 (6th Cir. 2007) ("[E]ven when a suspect has a weapon, but the officer has no reasonable belief that the suspect poses a danger of serious physical harm to him or others, deadly force is not justified . . . In other words, mere possession of a weapon is not enough to satisfy [the officer's] burden at [the summary judgment] stage.").

In addition to the Ninth Circuit cases discussed above, federal courts of appeals repeatedly held in cases decided before Corporal Kisela shot Ms. Hughes

that an officer does not enjoy qualified immunity when she shoots a person who has a knife but is not threatening anyone with it. In these cases, as in the current case, one or more officers claim that the person they shot raised a knife or did something threatening with it, but other witnesses state that the shooting victim merely held the knife. The federal courts of appeals hold that summary judgment for the shooter is not warranted because the facts viewed in the light most favorable to the shooting victim fail to demonstrate a threat.

In *Sevier v. City of Lawrence*, 60 F.3d 695, 698 (10th Cir. 1995), police responding to a 911 call found a man (Sevier) sitting in his bedroom holding a knife. Sevier later emerged from the bedroom and stood in the doorway with the knife in his right hand. *Id.* Two officers repeatedly ordered Sevier to drop the knife. *Id.* When Sevier did not, they shot him. *Id.* The officers testified that Sevier had turned and lunged at one of them with the knife in a raised and striking position, but other witnesses stated that Sevier was simply standing there with the knife at his side. *Id.* The court of appeals found that it lacked jurisdiction to consider the officers' appeal from the district court's ruling that summary judgment was inappropriate because there were genuine disputes of fact. *Id.* at 700.

In *McKinney v. DeKalb Cty.*, 997 F.2d 1440, 1442 (11th Cir. 1993), police responding to a 911 call found McKinney in his closet, holding a butcher knife in one hand and a twelve-inch stick in the other. McKinney made a motion with the stick in his hand and began to rise from his seated position. *Id.* Officer Nelsen fired

at McKinney. *Id.* The court of appeals upheld the district court's denial of summary judgment to Officer Nelsen on qualified immunity grounds. *Id.* at 1443. Viewing the facts in the light most favorable to McKinney, the court assumed that he had put down the knife and was merely shifting position, not threatening anyone's safety, when Officer Nelsen shot him. *Id.*

In Reyes v. Bridgwater, 362 Fed. Appx. 403, 404–05 (5th Cir. 2010), police officers confronted Ceballos holding a kitchen knife in an entryway to an apartment. Officers ordered Ceballos to drop the knife multiple times. *Id.* at 405. Ceballos refused and threw down his cigarette. *Id.* Officer Bridgwater then shot Cellabos. *Id.* Officers testified that Cellabos stepped forward and raised the knife, but another witness testified that Cellabos neither stepped forward nor raised the knife. *Id.* The court of appeals reversed the grant of summary judgment in favor of Officer Bridgwater on qualified immunity grounds. *Id.* at 409. Viewing the facts in the light most favorable to the plaintiff, the court assumed that Cellabos held the knife and threw down his cigarette, but did not raise the knife or step forward. *Id.* at 407–08.

In *Duong v. Telford Borough*, 186 F. App'x 214, 215 (3d Cir. 2006), a police officer entered Duong's home in response to a call that three suspicious men had entered the home. When Officer Fox entered, he saw Duong on his back with a man on top of him. *Id.* As Officer Fox called for backup, Duong, who was holding a knife, chased the other men to the back of the house. *Id.* Officer Fox, who was not aware that Duong was

the homeowner, then shot Duong. *Id.* Officer Fox testified that he identified himself as police and told Duong to drop the knife, but Duong testified that he did not hear Officer Fox say anything before he was shot. *Id.* The parties also disputed Duong's position relative to Officer Fox and his movements before he was shot. *Id.* Officer Fox testified that Duong was walking towards him and lowered his body as if he was about to leap, but Duong testified that Officer Fox shot him as soon as he sat down with the knife in his outstretched right arm, pointed away from Officer Fox. *Id.* The court of appeals upheld the district court's denial of Officer Fox's motion for summary judgment. *Id.* at 219. The court of appeals found that a reasonable jury, viewing the facts in the light most favorable to the plaintiff, could conclude that Duong was sitting down and pointing the knife away from the officer at the time he was shot, and had not received any warnings to drop the knife. *Id.* at 217.

In *Mercado v. City of Orlando*, 407 F.3d 1152, 1154 (11th Cir. 2005), police officers found a man crying on the kitchen floor and holding a knife pointed at his chest. They ordered him to drop the knife, and he refused, but he did not make a threatening move. *Id.* A police officer used a device to launch a polyurethane baton at the plaintiff's head, causing brain injury. *Id.* at 1154–55. The officer argued that he was entitled to summary judgment because the man had a knife and "suicidal subjects sometimes make erratic moves that can jeopardize the safety of the officers on the scene." *Id.* at 1157. The court disagreed because the knife was not pointed at a police officer or third party. *Id.* at 1160.

C. Kisela Is Not Entitled to Qualified Immunity Because Prior Cases Had Clearly Established a Set of Factors that Govern Use of Deadly Force, and Every One of Those Factors Cuts in Favor of Hughes.

As the panel stated, Ninth Circuit decisions interpreting this Court's jurisprudence clearly establish a particularized set of factors that govern police shooting cases. Pet. App. 52. These factors are far more detailed and specific than a bare standard of fault—such as the requirement that police use only "reasonable" force. The specific factors put real meat on the bones. They are: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officer or others, (3) whether she is actively resisting arrest or attempting to evade arrest by flight, (4) the availability of less intrusive force, and (5) whether proper warnings were given. Pet App. 37–38 (citing *Garner*, 471 U.S. at 8–9; *George v. Morris*, 736 F.3d 829, 837 (9th Cir. 2013); *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010); *Deorle* 272 F.3d at 1283–85 (9th Cir. 2001)).

Not only does the law clearly establish a detailed set of factors to be considered, but *every one* of those factors cuts in favor of Ms. Hughes. The panel carefully applied each factor to the facts, viewed in the light most favorable to Ms. Hughes.

Under the first factor (severity of the crime at issue), the panel found that no crime had been reported. Pet. App. 40. Under the second factor (immediate threat), Hughes posed no immediate

threat under the facts viewed in the light most favorable to her. Pet. App. 38–39. Under the third factor (attempt to flee or resist arrest), Hughes did not resist because officers made no attempt at arrest. Moreover, she did not seem to hear the officers' warnings or understand the events unfolding around her. Pet. App. 40–41. Under the fourth factor (mental illness), Corporal Kisela had reason to suspect mental illness based on the initial "check welfare" report, which conveyed that Hughes had earlier tried to cut a tree with a knife. Pet. App. 41. Under the fifth factor (availability of less intrusive means), an expert witness for Hughes concluded that Corporal Kisela had a Taser and should not have used his gun. Pet. App. 42. Indeed, the expert concluded that "shooting through the fence was . . . dangerous." Pet. App. 42. One might add to the analysis of less intrusive means the fact that Officer Garcia was inclined to "use some lesser means" than shooting Hughes because there was time "[t]o try to talk her down." ER 120–121.

D. The Court of Appeals Did Not Define Clearly Established Law at Too High a Level of Generality.

Contrary to the argument of petitioner and the dissent, the court of appeals did not define clearly established law at too high a level of generality. As demonstrated above, the panel's decision was dictated by precedent from both the Ninth Circuit and other courts of appeals, which established that holding a weapon but not threatening people with it does not license the police to open fire. *See supra* § II.B.

When the facts in this case are properly viewed in the light most favorable to Hughes, it becomes difficult to identify what more law petitioner and the dissent deem necessary to overcome qualified immunity. Perhaps they would require a Ninth Circuit case with very similar facts, but that is the very thing that this Court repeatedly has stated is *not* necessary. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011))); *White*, 137 S. Ct. at 551 (per curiam) (same); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (stating that a "fundamentally similar" or "materially similar" previous case is not required).

As Judge Berzon wrote in her concurrence in the denial of rehearing en banc, "the panel opinion is a routine application of qualified immunity principles to a set of facts that, under the applicable precedents, any reasonable officer should have realized did not justify the use of deadly force." Pet. App. 17. Indeed, the same panel of judges that reversed the grant of qualified immunity in this case reversed a denial of qualified immunity in *Isayeva v. Sacramento Sheriff's Department*, 872 F.3d 938, 942 (9th Cir. 2017), a case argued before the panel on the same day as this case.[1] Like this case, *Isayeva* also involved police officers who shot a mentally ill individual. *Id.* at 942, 944. Far from

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[1] Oral Argument, *Isayeva v. Sacramento* Sheriff's Department, 872 F.3d 938 (No. 15-17065), *available at* https://www.ca9.uscourts.gov/media/view.php?pk_id=0000016282.

campaigning to upend qualified immunity law by relying on overly broad legal principles, the panel was simply applying law to fact when it decided both this case and *Isayeva*.

E. No Appellate Judge Disagreed with the Conclusion that Kisela Committed a Constitutional Violation.

Petitioner makes much of the fact that seven judges dissented from the denial of rehearing en banc, suggesting if "judges cannot agree on the law," then the law must not be clearly established. Pet. 30. In fact, none of the court of appeals judges expressed doubt that a constitutional violation occurred.

Judge Sessions' opinion for the Ninth Circuit panel, joined by Judges Berzon and Gould, concluded, viewing the facts in the light most favorable to Hughes, that Kisela violated the Constitution when he shot Hughes and that he was not entitled to qualified immunity. Pet. App. 49. Judge Berzon's concurrence in the denial of rehearing en banc reached the same conclusions. Pet. App. 17.

Judge Ikuta's dissent from the denial of rehearing en banc argued that Kisela is entitled to qualified immunity. Pet. App. 19–22. Judge Ikuta did not address the panel's holding on whether a constitutional violation occurred. Pet. App. 19–22. No appellate judge has ever suggested that Kisela did anything other than violate the Fourth Amendment when he shot Ms. Hughes.

Petitioner appears to be conflating lack of unanimity on two separate issues—(1) whether a

constitutional violation occurred, and (2) whether a defendant is entitled to qualified immunity despite the constitutional violation. While petitioner cites authority suggesting that disagreement on the first question may suggest a lack of clearly established law, there is no authority for the proposition that a defendant is entitled to qualified immunity whenever one or more dissenting judges believe qualified immunity should apply. See Pet. 29 (citing *Wilson v. Layne*, 526 U.S. 603, 618 (1999), and *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013)).

III. This Case Does Not Present the Question Whether the Police May Use Deadly Force To Prevent Third Party Harm, Nor Is There a Circuit Split on that Question.

Laboring to manufacture a circuit split, Kisela incorrectly claims that the court of appeals decision "fail[s] to [c]onsider [p]otential [t]hird-[p]arty [h]arm," and thereby creates a circuit split over whether a risk of serious third-party harm can justify the use of deadly force. Pet. 12. Both parts of this assertion are incorrect. First, in this case, the court of appeals considered third-party harm, hewing to the settled and obvious principle of law that the police can use deadly force in the face of a real threat of harm to a third party. Pet. App. 58–59. Second, there is no circuit split on whether police may use deadly force to prevent such harm.

A. This Case Does Not Present the Question Whether a Police Officer May Use Deadly Force To Prevent Third Party Harm.

This case does not present the question whether police officers may use deadly force to prevent serious injury to a third-party—everyone, the panel included, agrees on the unremarkable proposition that police may do so. In evaluating the reasonableness of petitioner's use of lethal force, the court of appeals looked to the factors this Court set out to guide this inquiry in *Graham v. Connor*, 490 U.S. 386, 396 (1989). Pet. App. 57. Under the second factor of the *Graham* inquiry, the Ninth Circuit considered whether Hughes posed an immediate threat to "the safety of the officer *or others*." Pet. App. 57 (emphasis added). In applying this standard to the facts of the case, the court considered Officer Kisela's stated concern for Chadwick's safety, but found that "a simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such concern." Pet. App. 58 (quoting *Deorle* 272 F.3d at 1281 (9th Cir. 2001)). Because the facts of this case, viewed in the light most favorable to Hughes, did not present such objective factors, Corporal Kisela was not entitled to summary judgment. Pet. App. 59.

Kisela acknowledges, as he must, that the reasonableness of an officer's use of deadly force is judged on the "facts and circumstances of each particular case." Pet. 13 (quoting *Graham*, 490 U.S. at 396). Based on the particular facts of this case, viewed in the light most favorable to Hughes, the court of

appeals reached a fact-bound holding that a reasonable jury could have found that Hughes did not pose a serious risk to third parties.

B. There Is No Circuit Split as to Whether Police Officers May Use Deadly Force To Prevent Third Party Harm.

The court of appeals decision does not conflict with the decisions of any other circuit. On the contrary, the cases from other circuits that Kisela puts forth could not be more different than this case—they involve a genuine risk of third-party harm.

Untalan v. City of Lorain, 430 F.3d 312 (6th Cir. 2005), *cited in* Pet. 17, does not bear any resemblance to this case. In *Untalan*, an officer used lethal force against a suspect who was wrestling for control of a butcher knife after lunging at and stabbing an officer with the knife. *Id.* at 313–14. There is no comparison between, on the one hand, wrestling with a police officer for a butcher knife and, on the other, standing in a yard while holding a kitchen knife at one's side and engaging in conversation.

Similarly, in *Larsen's Estate v. Murr*, 511 F.3d 1255 (10th Cir. 2008), *cited in* Pet. App. 16, officers used deadly force against a man who raised a knife above his shoulder with the blade pointed outwards. *Id.* at 1258. When officers warned him that they would shoot if he did not drop the knife, he advanced toward the officers. *Id.*

Mace v. City of Palestine, 333 F.3d 621 (5th Cir. 2003), *cited in* Pet. 17, fits the pattern of *Untalan* and *Larsen's Estate*—police shot someone who did not

merely hold a weapon, but wielded it in a threatening manner. In *Mace*, police officers arrived to the scene to find a man with bloody hands smashing windows and brandishing a sword. *Id.* at 623. The man raised the sword toward the police, made punching motions with it, and advanced toward the officers, who had difficulty retreating due to the close quarters of the mobile-home park in which the incident took place *Id.* at 624–25. This is a far cry from holding a kitchen knife in one's yard.

In *Thomson v. Salt Lake County*, 584 F.3d 1304 (10th Cir. 2009), cited in Pet. 16, the plaintiff was armed with a gun, not a knife, and he had previously moved the firearm up and down and aimed it at the officers. *Id.* at 1318. Unlike Ms. Hughes, he therefore posed "an immediate threat to [the officers] or to others in the neighborhood." *Id.*

In *Long v. Slaton*, 508 F.3d 576, 578–79 (11th Cir. 2007), *cited in* Pet. 16, a police officer tried to arrest a man who responded by *stealing the officer's police cruiser* and driving off. The court found the use of force reasonable based on the unique dangers posed by an erratic person in control of a police car: "We stress these facts: Long was mentally unstable; and he had taken control of not just any vehicle, but a *police* cruiser. . . . Different from other vehicles, this fully marked and fully equipped police cruiser had an even greater potential for causing—either intentionally or otherwise—death or serious bodily injury." *Id.* at 581.

There is no circuit split here. The court of appeals, like every other circuit, considered third-party harm. Viewing the facts in the light most favorable to

Hughes, the court of appeals concluded, correctly, that the circumstances of the shooting did not reveal an appreciable risk of harm to Chadwick. To manufacture daylight between the decisions below and the cases discussed above, the petition resolves disputed facts against Hughes, assuming, for example, that Kisela thought she was raising the knife at Chadwick when he opened fire. Pet. 19.

C. There is No Conflict Between the Decision Below and the Prior Decisions of the Ninth Circuit and this Court.

Petitioner's efforts to invent a conflict between the prior decisions of the Ninth Circuit and this Court follow the same faulty logic as his attempt to conjure a circuit split. Petitioner imagines a serious threat to Ms. Chadwick by refusing to consider the facts in the light most favorable to Ms. Hughes. Because the facts viewed in the light most favorable to Ms. Hughes present no such risk, the tension petitioner imagines between the decision below and holdings of this Court and the Ninth Circuit does not exist.

The Ninth Circuit's decision in *Blanford* has been discussed above. *See supra* § I.C. This Court's decision in *Scott v. Harris*, 550 U. S. 372 (2007), *cited in* Pet. 15, is also far off the mark. In *Scott*, the plaintiff led police on a car chase at speeds topping 85 miles an hour, evaded pursuit by driving into and colliding with a police cruiser, and kept going. *Id.* at 374–75. This Court held that it was reasonable for a police officer to bump the fugitive's vehicle from behind so as to disable it. *Id.* at 384. The Court summarized a videotape of the chase as follows:

> There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up . . . [W]hat we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Id. at 379–80.

There is no meaningful comparison between an officer bumping a suspect's car from behind after the suspect led police on a Hollywood-style chase, and shooting a woman who is holding a kitchen knife while conversing in her own yard.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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No. 17-467

In the Supreme Court of the United States

ANDREW KISELA,

Petitioner,

v.

AMY HUGHES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

The primary error below, which prompted Judge Ikuta and six of her colleagues to dissent from the denial of rehearing en banc, is the level of generality at which courts declare "established law" for purposes of qualified immunity. *See* App. 17. The Ninth Circuit panel found "established law" controlling this case only by framing both the contested conduct and existing precedent at an exceedingly high level of generality. Pet. 21-30. After all, only by extreme abstraction can the Ninth Circuit maintain its rule that "qualified immunity may be denied in novel circumstances." App. 45; *see also* Pet. 27 n.2 (discussing impossibility of this rule after *White v. Pauly*, 137 S. Ct. 548 (2017)). Summary reversal is appropriate on this point. Secondarily, the Ninth Circuit exacerbated a circuit split on the relevance of potential third-party harm in excessive-force cases.

Hughes's Brief in Opposition ignores the former point and attempts to obscure the latter by asserting that the Petition and Judge Ikuta's dissent misstate the relevant facts. In doing so, Hughes adopts contradictory arguments. On the one hand, the Ninth Circuit panel stripped Officer Kisela of qualified immunity by unjustified abstraction. On the other hand, Hughes now attempts to evade this Court's review by arguing that this case is fact-intensive. Not only are these positions an uncomfortable pair, but Hughes misunderstands the direction in which fact-intensity cuts: the burden is on the party seeking to *defeat* qualified immunity to identify precedent with facts sufficiently on point to "place[ ] the statutory or constitutional question beyond debate." *Ashcroft v. al-*

Kidd, 563 U.S. 731, 741 (2011). Because that feat is possible only with impermissible abstraction, this Court should grant the Petition and reverse the decision below.

I. The Undisputed Facts on Which the District Court Relied Are Sufficient for Summary Judgment.

This case turns on legal errors. Nevertheless, Hughes poses nine questions supposedly illustrating hopelessly disputed facts. Her dispute, however, concerns the legal conclusions to be drawn from facts rather than a dispute over the facts themselves.

Use of deadly force is appropriate "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). "[T]he reasonableness of [an officer]'s actions . . . is a pure question of law." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007). With that standard in mind, and viewing the evidence in the light most favorable to Hughes, the following statements answer her questions.

1. Did Hughes appear agitated, or was she calm and peaceable? Br. in Opp. 8.

During the confrontation, she appeared "composed and content." ER 109.

But that does not equate to her being "harmless" or "peaceable." *Cf.* Br. in Opp. 8. Tragically, people who harm others are sometimes perfectly composed when doing so.

The district court rightly granted summary judgment on the basis of the following uncontroverted evidence. Shortly before the encounter, a woman matching Hughes's description was seen hacking at a tree with a large kitchen knife. ER 280-81. Hughes held a large kitchen knife as she walked down the driveway and approached Chadwick. ER 281, 284-85, 313, 322. She followed Chadwick when the latter tried to back away. ER 200, 207-09, 281, 290. And Hughes disregarded at least two orders to drop the knife. ER 208, 281. This conduct occurred not in the kitchen but in the driveway, where carrying such a knife makes little sense. Hughes was not "harmless" in this context.

To suggest a material dispute on this point, Hughes cites only her denial of a Request for Admission, in which Kisela asked her to "[a]dmit that you were not acting peaceably when the police confronted you on May 21, 2010." ER 194-95. In the same document, Hughes also denies that the kitchen knife "was a deadly weapon" or was "capable of causing serious bodily harm to Sharon Chadwick." ER 195. These made-for-litigation denials do not a controversy make.

2. Did Hughes threaten Chadwick? Br. in Opp. 9.

The officers did not hear Hughes make any overt threats against Chadwick, ER 325, or see any "threatening or aggressive gestures," ER 305-06.

But the question is whether Kisela had probable cause to believe that Hughes posed a threat to Chadwick. *Garner*, 471 U.S. at 3. The facts reprised above present a situation—caused by Hughes's actions—that establish precisely that probable cause.

Importantly, however, this is a legal conclusion rather than a factual dispute. *Scott*, 550 U.S. at 381 n.8.

3. How many times did the police instruct Hughes to drop the kitchen knife? Br. in Opp. 10.

Chadwick heard "one of the officers yell 'drop the knife' two times, very quickly." ER 109. The district court relied on this undisputed number. App. 72.

4. Did the officers reasonably believe that Hughes heard their instructions to drop the kitchen knife? Br. in Opp. 10; *see id.* at 15, 16.

This question is immaterial. Hughes cites no authority holding, or even intimating, that an officer may not use deadly force if the suspect does not actually hear and understand the orders. Indeed, even the requirement that an officer provide a warning is not absolute. *Garner*, 471 U.S. at 11-12 (officers should provide warning "where feasible"); *White*, 137 S. Ct. at 551 (reversing denial of qualified immunity that rested on failure to say anything before shooting). Here, it is undisputed that the officers shook the fence to get Hughes's attention and ordered her at least twice (in a scenario that unfolded in less than a minute) to drop the knife. ER 109.

5. What did Chadwick say to the officers who were pointing their guns at Hughes? Br. in Opp. 11; *see id.* at 15.

"Take it easy," which she said to both the officers and Hughes. ER 199.

6. When Kisela shot Hughes, how far apart were Hughes and Chadwick? Br. in Opp. 11.

–and–

7. When Kisela shot Hughes, was Hughes approaching Chadwick or standing still? Br. in Opp. 12; *see id.* at 15.

Hughes had moved to within five-to-six feet away from Chadwick, ER 281, and stood there, ER 306.

There was no need to move any closer: she was already in the "kill zone," ER 281, 290, where she could have attacked Chadwick in less than half a second, ER 235, giving Kisela extremely little time to make a decision and take action to protect Chadwick. In short, Hughes did not need to get any closer to pose a threat.[1]

8. Did Hughes "wield" the kitchen knife at any point? Br. in Opp. 12; *see id.* at 15.

Hughes challenges the Petition's and Judge Ikuta's use of the word "wield" to describe her being armed with a large kitchen knife as she stood within six feet of an unarmed woman. Br. in Opp. 12-13. She relies on Judge Berzon's footnote stating that "wield" has been defined as, for example, "[t]o use or handle with skill and effect." App. 15 n.3. This is just caviling. The word does not necessarily connote skillful use. It also means "handle" or "use." Bryan A. Garner, *Garner's Modern American Usage*, 864 (2009). But to placate Hughes, one could replace all instances of

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[1] Hughes states that during the confrontation, she moved away from Chadwick. Br. in Opp. 12. But when Kisela fired, she had approached and was standing close to Chadwick. ER 306.

"wield" with a different term—the district court used "carrying" and "holding," App. 72—without changing the analysis or result.

9. When Kisela shot Hughes, where was the knife? Br. in Opp. 13.

It was in Hughes's hand, held down at her side. ER 109.

Apart from these nine "questions," Hughes argues, incorrectly, that the Petition and Judge Ikuta's dissent omit material facts.

She first notes that only Kisela fired his gun. Br. in Opp. at 13-14. Though true, this fact is insignificant. The question is whether there was probable cause for Kisela to use force. *Garner*, 471 U.S. at 3. Hughes cites no authority establishing that an officer's use of potentially deadly force is legitimate only if *all* officers on the scene take the same action. Many factors can play into an officer's split-second decisions in dangerous situations like this one. For example, an officer might not have a clear line of fire to the suspect, which was true of Officer Kunz. ER 325.

Hughes next argues that it is unfair to describe her as having acted erratically. Br. in Opp. 15-16. She appears to concede that walking down the street and hacking at a tree with a large kitchen knife—the conduct that brought the officers to the scene—was erratic. *Id.* She asserts, however, that she was calm when the officers arrived. *Id.* at 16. There are at least two problems with this argument. First, little time had elapsed between the report of her tree-hacking and the officers' arrival; certainly a reasonable officer should bear in mind the subject's recent behavior when faced

with a potential life-or-death situation. Second, following an unarmed person down a driveway with a kitchen knife is itself erratic behavior.

Hughes strategically plays up the fact-intensiveness of this (like every) qualified-immunity case in an attempt to dissuade the Court from exercising review. But nothing in the Petition, Judge Ikuta's dissent, or the district court's opinion relies on disputed facts. The question on which the Ninth Circuit panel erred was whether a reasonable person in Officer Kisela's position could have perceived that Hughes posed a threat to Chadwick (and, if not, whether the unconstitutionality of the force used was clearly established, *see infra* Part II). The panel thus incorrectly decided a legal question. *See Scott*, 550 U.S. at 381 n.8. The relevant facts are known, and this Court should not decline to review the Ninth Circuit's flawed legal conclusion regarding the reasonableness of Officer Kisela's use of force.

II. Summary Reversal Is Appropriate Because Precedent Had Not Clearly Prohibited Kisela's Actions.

Qualified immunity requires a two-part showing: "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Al-Kidd*, 563 U.S. at 735. The two-part approach is important because the existence of a constitutional violation in Fourth Amendment cases "depends very much on the facts of each case," due to the "hazy border between excessive and acceptable force." *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (internal quotation marks and citation omitted).

Against this backdrop, Hughes asserts that any constitutional violation Kisela committed was an obvious one. Br. in Opp. 19. To dispel the haze and adopt this position, the Ninth Circuit panel needed to find precedent with facts sufficiently close to those presented here such that "*every* reasonable official" would have known that Kisela's actions violated the Fourth Amendment. *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (emphasis added; quotation marks omitted). The panel purports to clear this hurdle by abstracting to a level of generality that allows comparison of otherwise distinguishable cases. To the contrary, the closest authority supports the legality of Kisela's actions.

Hughes bears the burden of "identify[ing] a case where an officer acting under similar circumstances as [Kisela] was held to have violated the Fourth Amendment." *White*, 137 S. Ct. at 552. Although she need not identify a case where "the very action in question has previously been held unlawful," *Wilson v. Layne*, 526 U.S. 603, 615 (1999), she must identify "existing precedent [that] placed the . . . constitutional question *beyond debate*." *Al-Kidd*, 563 U.S. at 741 (emphasis added); *accord Brosseau*, 543 U.S. at 201 (recognizing qualified immunity because previous cases did not "squarely govern[ ] the case"). Because this Court's case law provides no such clear condemnation, Hughes needed to identify a "'robust consensus of cases of persuasive authority.'" *Id.* at 742 (quoting *Wilson*, 526 U.S. at 617).

Hughes did not—indeed, cannot—carry this burden. Above all, *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005), prevents a finding of clearly

established law. As Judge Ikuta demonstrated, *Blanford*'s reasoning applies here. Similar to the subject in that case, Hughes:

- was armed;
- did not drop her weapon when ordered to do so;
- was not surrounded; and
- moved to within striking distance of Chadwick, "where she could have caused harm that the officers would not have been able to prevent."

App. 28. Thus, "Kisela could have reasonably relied on *Blanford* to justify his use of force against Hughes." *Id.* And this case is arguably even stronger than *Blanford*, where the potential victims were only hypothetical. 406 F.3d at 1113-17 (finding no constitutional violation where the officer shot a suspect in order to protect third parties who *might* have been—but actually were not—inside the home).

Hughes dismisses *Blanford* on the basis of immaterial factual distinctions. Br. in Opp. 16-17. This effort is misguided because Hughes and Kisela do not have an equal responsibility to find controlling precedent. Hughes alone must identify a case that would have put Kisela's actions beyond debate, and of all the cases cited in this litigation, *Blanford* is the most similar.

Rather than finding a case with similar facts that found a constitutional violation, Hughes, like the Ninth Circuit panel, collects cases that state their desired legal outcome on easily distinguishable facts. Br. in Opp. 19-26; *see also* Pet. 21-28 (explaining why the

panel's cited cases did not clearly establish a constitutional violation). Legal standards, however, are not enough when they are not particularized to the situation at hand, as this Court recently repeated. *White*, 137 S. Ct. at 552 (reiterating "the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality'") (quoting *Al-Kidd,* 563 U.S. at 742); *see Anderson v. Creighton,* 483 U.S. 635, 640 (1987). This requirement is especially important in Fourth Amendment cases. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

In fact, Hughes's task is impossible. *Blanford* is the most analogous case, and it holds that no constitutional violation occurred. 406 F.3d at 1116-19. That is the antithesis of a clearly established constitutional violation in the circumstances that confronted Kisela.

Finally, Hughes misrepresents the Petition's argument regarding disagreement among the Ninth Circuit judges. Kisela does not argue that qualified immunity is inappropriate based on the dissenting appellate judges' having found no constitutional violation. Br. in Opp. 28. Kisela's argument instead relies on the wide chasm between the judges over whether the law was clearly established. Seven appellate judges, reading the same cases as the panel, were unable to identify precedent clearly on point. If they could not do so with the benefit of briefing and time for consideration, then Kisela "had no fair and clear warning of what the Constitution requires." *City of S.F. v. Sheehan*, 135 S. Ct. 1765, 1778 (2015) (internal quotation marks and citation omitted).

Kisela was entitled to qualified immunity, and the panel manifestly erred by denying it. Summary reversal is appropriate.

III. The Opinion Diverges from Four Circuits' Precedent on Potential Harm to Third Parties.

The Petition asks the Court to clarify an important factor in excessive-force cases: How immediate a threat to others' safety must the suspect pose before it is reasonable for an officer to use potentially deadly force? Pet. at 12. The panel opinion forbids an officer from using such force unless the suspect is actively committing an assault on the third party, or at least indisputably on the verge of doing so. That is incompatible with the law in at least four circuits in which courts have found officers' use of deadly force reasonable—and therefore constitutional—even when no victim is immediately present or when the suspect has not commenced an attack.

Hughes responds to the division among the circuits with nothing more than summarizing the facts of those cases and declaring that they involved a greater threat than the present case. Br. in Opp. 31-32. That conclusory "distinction" does not obscure the division in the circuits' approach to third-party safety.

The Tenth Circuit, for example, has ruled that "[a] reasonable officer need not await the glint of steel before taking self-protective action; by then it is often . . . too late to take safety precautions." *Larsen's Estate v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) (internal quotation marks and citation omitted).

The Eleventh Circuit reached a similar conclusion in *Long v. Slaton*, 508 F.3d 576 (11th Cir. 2007). There, an officer shot an individual who had just stolen the officer's cruiser. *Id.* at 579. This occurred in a remote, rural area, and the suspect was driving away from the officer. Nonetheless, the court found it reasonable to protect potential (but not immediately present) victims. Echoing *Larsen's Estate*, it recognized that "an officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force." *Id.* at 581 (internal quotation marks and citation omitted).

Hughes responds by distinguishing certain facts. Br. in Opp. 31-34. This is essentially the same exercise in abstraction that dooms the panel decision below and warranted this Court's reversal in *White*. For example, the weapon in *Long* was a police cruiser, which, when used for unintended purposes, can cause "death or serious bodily injury." Br. in Opp. 32. That fact actually links the two cases: large kitchen knives can also cause death or serious bodily injury when not used for their intended purpose.

The Petition's point—which Hughes ignores—is that some circuits recognize that deadly force can reasonably be used even when the suspect is not yet indisputably engaging in an actual attack on a specific victim. The opinion below diverges from those cases, thereby creating a split on this vital issue. This Court should resolve that split in favor of protecting third parties.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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